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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 24, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 901

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 25, 1935.

[fol. 1]

IN COURT OF CLAIMS

No. E-346

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed May 23, 1925

To the Honorable Chief Justice and the Judges of the Court of Claims:

Your petitioners, the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, parties to the treaty of October 14, 1864 (16 Stat., 707), residing on the Klamath Reservation in the State of Oregon, hereinafter called plaintiffs, respectfully show to the Court as follows:

[fol. 2]

I

By act of Congress approved May 26, 1920 (41 Stat., 623), jurisdiction was conferred upon the Court of Claims with the right of appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of plaintiffs against the United States, and to enter judgment thereon.

The Act is, in words and figures, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agree-

ments, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and [fol. 3] determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the depart- [fol. 4] ments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States

Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any [fol. 5] sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, that in no case shall the fees decreed by said Court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

II

By Act of July 2, 1864 (13 Stat., 355), there was granted to the State of Oregon, to aid in the construction of a military wagon road from Eugene City to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of the road. The act contains the following proviso:

"That any and all lands heretofore reserved to the United States by act of Congress, or other competent au-

thority be, and the same hereby are, reserved from the operation of this act, except as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

On October 24, 1864, the State of Oregon, by Act of its legislature, accepted the grant so made, and designated as [fol. 6] its assignee the Oregon Central Military Wagon Road Company to receive the grant, and to construct the road.

Thereafter, the road, 420 miles in length, was located, constructed and completed between the points named in the Act; and the Governor of Oregon, on January 12, 1870, certified to the Secretary of the Interior his acceptance of the same; after which the lands selected by the said Road Company, pursuant to the provisions of Section 4 of the Act, were certified by the Secretary of the Interior to the State of Oregon.

III

On July 2, 1864, plaintiffs were an Indian tribe occupying, and in undisputed possession of, the following described lands in the State of Oregon:

"Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade Mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters of the north; thence along said dividing ridge in an easterly direction to the southern end of Goose Lake; thence northeasterly to the northern end of Harney Lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning."

By Act of March 25, 1864 (13 Stat., 37), the President had been authorized to conclude a treaty with plaintiffs for their country above described, the act providing:

[fol. 7] "That the President be, and he hereby is, authorized to conclude a treaty with the Klamath, Moadoc and Snake Indians in Southeastern Oregon for the purchase of the country occupied by them."

And negotiations therefor were shortly thereafter begun.

By Treaty concluded October 14, 1864 (16 Stat. 707), plaintiffs ceded to defendant the lands above described, saving and reserving therefrom a tract embracing approximately 2,500,000 acres lying within the limits of the cession, a correct description of the boundaries of which is as follows:

"Beginning at the point on the east shore of Upper Klamath lake known as Kalwal, or the Point of Rocks, and running thence in a westerly direction, across said lake, to a point known in the Indian language as Kom-kom-la, or Little Aspen Butte; thence, along the summit of the ridge of mountains lying immediately west of the lake through a point known to the Indians as Posk-nect-ka, or Aspen Butte, to the summit of a mountain known in the Klamath language as Mon-jina; thence in a northerly direction, along the summit of the mountain to Jon-doles, or Klamath Point; thence, in a northerly direction through Bunker Hill to Tum-sum-nina, or Goose Nest; thence, following the summit of the ridge north and east, around the south side of Crater Lake, to Tum-sum-ne, or Mount Scott; thence, north, along the summit of the ridge, through Timber Crater and Summit Point, to Hischok-wal-as, or Mount Thielson; thence, in a northerly direction, along the summit of the ridge, through Hemlock mountain, Tipsee Peak, Mule Butte [fol. 8] and Cow Horn Mountain, to Emigrant Butte; thence, in a northerly direction, along the summit of the ridge, to Ba-la-wisk-se; thence, in a southeasterly direction to Tsne-wheel-sto-e-los, or Walker mountain; thence, in an easterly direction to the summit of Ba-ha, or Bald mountain; thence in a southeasterly direction to the summit of Chok-chok-lisk-se, or Mount Hager; thence, in a southeasterly direction to the summit of Winter Ridge; thence, along the summit of Winter Ridge, in a southerly direction to Wol-lock-se-klos; thence, in a southerly direction to a point called E-o-lum-na; thence, in a westerly direction to the summit of We-leej, or Horse Fly mountain; thence, in a southwesterly direction to the summit of the mountain the extremity of which forms the Point of Rocks; thence, along said ridge to Kal-wal, the point of beginning.

A copy of the Treaty and of the Proclamation thereof by President Grant is hereto attached, marked Exhibit No. 1 and made a part of this petition.

The language adopted by defendant to describe the reservation, as found in Article I of the Treaty, did not correctly embody the agreement between the parties with reference to the reservation boundary, as defendant itself later admitted, but led to three successive erroneous surveys by the Government—one in 1871, one in 1888, and one in 1900.

V

The final location of the right of way of said military wagon road, selected by the Oregon Central Military Wagon Road Company, in 1865, and on which location the road [fol. 9] was ultimately constructed, lay within plaintiffs' reservation lands for a distance of approximately one hundred miles, and for a further distance of approximately fifteen miles it lay within three miles of the reservation line, as shown on Exhibit No. 2 hereto attached.

VI

Plaintiffs show that at no time between July 2, 1864, and June 17, 1901, were their reservation lands public lands, subject to entry under the General Land Laws of the United States; that while it is true the fee simple title thereto was held in trust for them by defendant, they, the plaintiffs, were the sole and exclusive owners of all the said lands up to June 17, 1901, and that, save only as to the location of rights of way over the same, provision for which is found in Article I of the said treaty, reading:

"Provided, also, that the right of way for public roads and railroads across said reservation is reserved to citizens of the United States."

their lands were excluded from the operation of the said act of July 2, 1864, by the following express provision of the act itself:

"That any and all lands heretofore reserved to the United States by Act of Congress or other competent authority, be, and the same are, reserved from the operation of this Act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

and, further, by the defendant's express covenant in Article I of the treaty:

[fol. 10] "It is further stipulated and agreed that no white persons shall be permitted to locate or remain upon the reservation, except the Indian Superintendent and Agent, employees of the Indian Department, and officers of the Army of the United States."

VII

By Act of December 26, 1866, the said Act of July 2, 1864, was amended so as to extend the grant, for indemnity purposes, over odd sections, not reserved, within six miles on each side of the road:

"That there be, and is hereby, granted to said State, for the purposes aforesaid, such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the surveyor-general of said State, as shall be sufficient to supply any deficiency in the quantity of said grant as described, occasioned by any lands sold or reserved, or to which the rights of pre-emption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act."

This provision for indemnity afforded the State of Oregon and its assignee ample protection against any loss of lands that might otherwise have arisen out of the location of a part of the road within or adjacent to plaintiffs' reservation.

VIII

Plaintiffs show that notwithstanding the said covenant in the Treaty; and notwithstanding the language of the Act of July 2, 1864, expressly excluding "reserved lands" [fol. 11] from the operation of the land grant provision; and notwithstanding the said amendatory act of December 26, 1866, indemnifying the State of Oregon and its assignees, against loss in the premises, patents for more than 130,000 acres of land within plaintiffs' reservation (in excess of lands required for the right of way of the aforesaid wagon road), to which the Indian title had not yet been extinguished, were allowed by defendant to issue, under the provisions of the Act of July 2, 1864, to citizens of the

United States, without compensation to plaintiffs, and without their knowledge or consent.

IX

The Treaty aforesaid, although executed October 14, 1864, was not proclaimed until in the year 1870; and the first survey of the boundaries of plaintiffs' reservation was not made until in the year 1871; and plaintiffs allege that by reason of these facts, and further by reason of their ignorance of the operation of the public land laws of the United States, they were easily kept in ignorance of the erroneous issuance of patents for lands within their reservation until long after the road was completed and the patents delivered.

X

And while steps were thus being taken in Oregon to vest in citizens of the United States title to large areas of land within plaintiffs' reservation, without compensation to them and without their knowledge or consent, a controversy existed over the matter, between the Indian Bureau and the General Land Office at Washington, D. C., from about the year 1872 up to 1889, as hereinafter shown.

[fol. 12] The contention of the General Land Office was, that because of the delay in the proclamation of the Treaty and in bringing to the attention of the office the matter of irregularity in the issuance of the patents the Indians had lost title to the lands so patented; the contention of the Indian Office, on the other hand, was that until extinguishment of the Indian title the validity of such patents could not be maintained.

Under date of September 12, 1878, the Secretary of the Interior, in replying to a letter from the Commissioner of Indian Affairs, in relation to the status of the Klamath Indian Reservation, says, in speaking of the Oregon Central Military Wagon Road grant:

"Said road was definitely located through the Klamath Indian Reservation October 1, 1865, and on April 2, 1871, and December 8, 1871, this Department certified and allowed to the State of Oregon, in place within the boundaries of the Klamath Indian Reservation, 102,313.19 acres and in the indemnity limits there was certified and allowed to the State, 5,897.08 acres—in all, 108,210.27."

With reference to setting aside the allowances of land within the reservation, the Secretary adds:

"Although this allowance was made by the Department after the treaty made with the Indians October 14, 1864 (16 S., 708), making provision for their reservation by natural boundaries had been proclaimed by the President February 17, 1870, and become a law upon the statute books there does not appear to be any power reposed in this De-
[fol. 13] partment by which it can annul or set aside the allowances of lands situated in the Klamath Indian Reservation which were made to the State of Oregon in 1871."

In further discussing the status of the patented lands the Secretary says:

"I am of the opinion that the Government is not now in the position to bring a suit in a court of competent jurisdiction in order to test the validity of the title to the lands allowed and certified to the State of Oregon under the act of Congress for the use of the Oregon Central Military Road Company and its successors and assigns."

The Secretary concludes his letter by offering the following suggestion in regard to a feasible method of correcting the wrong:

"In view of the existing state of affairs, in relation to the conflicting claims of title to lands situated within and without the boundaries of the Klamath Indian Reservation as defined by the Government survey, approved December, 1871, I am of the opinion that your fourth proposition will be the only feasible solution of the whole matter—that an inspector of your Department be requested to visit the Indians located upon the Klamath Reservation, in the State of Oregon, and ascertain as to whether negotiations can not be entered into, either for the removal of said Indians to a new reservation, the locality of which to be hereafter determined, or of consolidating them with some other Indian tribes already located upon an existing reservation."

[fol. 14] XI

Meanwhile, during the period above named, unsuccessful attempts were being made to find a way, by action of the Department or by the aid of Congress, to remove the Kla-

math Indians from their old home, to vacate their reservation, and to throw it open to white settlement.

XII

By the Act of March 2, 1889 (25 Stat. 850), no effective measures having yet been taken to relieve plaintiffs or to protect their rights in the premises, and the Legislature of Oregon having memorialized Congress on the subject (among other things) of the said road grant, it was made the duty of the Attorney General of the United States, within six months, to cause suits to be brought in the name of the United States against persons or corporations claiming to own or to have an interest in the lands granted to the State of Oregon under the said Act of July 2, 1864 (and other similar acts), to determine the rights of such persons or corporations in the premises.

Suits were instituted under the act in the United States Circuit Court for the District of Oregon. After nearly fifteen years the litigation terminated as follows:

On February 1, 1904, in the case of United States v. California & Oregon Land Co. (192 U. S. 355), the contention advanced by the Attorney General of the United States, on behalf of plaintiffs, was rejected by the court, and the title [fol. 15] in the land grant patentees was upheld and sustained, on the ground that the latter were innocent purchasers.

By this decision plaintiffs were held to have lost title to approximately 130,000 acres of Reservation lands patented under the said Land Grant Act.

Referring to the foregoing decision, the Secretary of the Interior, in a letter on the subject addressed to the Speaker of the House of Representatives, after calling attention to the fact that the title to plaintiffs' erroneously patented lands had been litigated in a case that was three times before the Supreme Court of the United States says:

"The last decision of the Supreme Court was based on the contention in behalf of the Indians that they were not made parties to the previous suits. The only way they could come into court was through the United States, and the Supreme Court very justly said that this and the preceding suits being proceedings in equity, the United States could not continue indefinitely bringing such suits. In

other words, that the entire case should have been disclosed in the original proceedings."

He adds:

"No matter what may be said as to the merits of the Indians' claim to the land, it was not passed on because of the failure of the Government to proceed properly. But the Government's right was fully litigated and the Indians are debarred from further proceedings."

On the subject of the justice of the Indians' cause the Secretary further says:

[fol. 16] "The Indians have complained bitterly and have made, and continue to make, claim for compensation for the lands taken from them. I believe that their claim is just and that they should have reasonable compensation, and I do not believe it fair that they should be compelled to wait for a long term of years and finally employ attorneys to prosecute their claim."

XIII

In October, 1904, in response to a communication from the Superintendent of the Klamath Reservation requesting information, in contemplation of the Supreme Court decision, as to the status of the lands lying within the Klamath Reservation and patented under the provisions of the Act of July 2, 1864, the Secretary of the Interior directed the Superintendent to examine and appraise the said lands and to make report to the Department thereon; but for some reason the report was not submitted.

XIV

By the Act of March 3, 1905 (33 Stat. 1033), the Secretary of the Interior was authorized and directed to ascertain the reasonable value of the lands within the Klamath Reservation conveyed by the United States to the State of Oregon under the Act of July 2, 1864; what part of the same had been allotted to the Indians; and upon what terms the California & Oregon Land Company, owners of the same, would exchange the said lands for other lands within the original boundaries of the Klamath Reservation.

The Act provides:

"That the Secretary of the Interior be, and he is hereby, [fol. 17] authorized and directed to investigate and ascertain the reasonable value of the lands heretofore conveyed by the United States to the State of Oregon as a part of the grant of lands made to said State by the Act of Congress approved July second, eighteen hundred and sixty-four, entitled 'An Act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State,' and embraced within the boundaries of the original survey of the Klamath Indian Reservation in said State, and being the lands involved in the suit of the United States versus the California and Oregon Land Company, decided in favor of said company by the Supreme Court of the United States at the October term, nineteen hundred and three (volume one hundred and ninety-two, page three hundred and fifty-five, of the United States Reports), what part of said lands have been allotted to Indians and the value of the improvements thereon, and also for what price the said California and Oregon Land Company will convey the said lands to the United States, or on what terms the said company will exchange such lands for other lands, not allotted to Indians, within the original boundaries of said reservation.

"And it is hereby made the duty of the Secretary of the Interior to make a full and specific report to Congress, on or before the first day of the next session, in pursuance of the jurisdiction and duties imposed on him by this Act."

Patents for the lands referred to in the Act had been issued on April 2, 1873, to the Oregon Central Military Wagon Road Company; and shortly thereafter the lands were conveyed to the California & Oregon Land Company mentioned in the Act.

[fol. 18] XV

On October 25, 1905, Horace G. Wilson, then the Superintendent of the Klamath Indian Agency, having been directed to procure the information requested by the Secretary of his predecessor in relation to the status of said patented lands; filed a report in writing, submitting the results of his examination and appraisement, in which he announced that he had found heavy pine timber growing on a large part of the lands and that he had appraised the

value of the lands erroneously patented under the said Land Grant Act as a whole at $371,147.48.

XVI

On December 11, 1905, the California & Oregon Land Company, then in negotiation with the defendant for a sale of the said lands to the Government, informed the Secretary of the Interior that it had caused the reservation lands acquired by it under the provisions of the Act of July 2, 1864, aggregating 111,326.83 acres, to be appraised by leading bankers, stockmen and other business men of Klamath County; and that the value thereof had been found to be $903,213.05. The Company then offered to sell the said lands to the Government, as a whole, for $7.50 an acre; and further made an offer for exchange of lands; none of which offers were accepted by the United States.

XVII

By the Act of March 3, 1905, as aforesaid, the Secretary of the Interior was instructed, on or before the first day [fol. 19] of the next session, to make a full and specific report to Congress; and plaintiffs show that it thus became his duty to report in detail all the essential facts in regard to the erroneous issue of patents, of which plaintiffs now complain, under the Act of July 2, 1864, namely, that the same were issued in violation of defendant's covenant in the Treaty, likewise in violation of the terms of the Act of July 2, 1864, itself; that plaintiffs were not informed of the issuance of the patents at the time, and were kept in ignorance thereof until after title had passed to persons held by the Supreme Court of the United States to be innocent purchasers; that plaintiffs had no power to protect themselves in the premises, and were forced to rely upon defendant for protection; that, as stated by the Secretary of the Interior, the failure of plaintiffs' contention in the Supreme Court of the United States was because of the failure of the Government to proceed properly; that by reason of the erroneous issue of the patents, and defendant's failure to defend and protect, plaintiffs had lost title to 111,385 acres of land estimated by the then owners to be worth $903,213.05.

Such report by the Secretary was not made.

XVIII

By the Act of June 21, 1906 (34 Stat. 325, 368), no report having been made to Congress in response to the Act of March 3, 1905, and the Secretary of the Interior having elected not to recommend a purchase of plaintiffs' lands [fol. 20] from the California & Oregon Land Company he was authorized, in his discretion, to exchange certain unallotted lands within the Klamath Indian Reservation, not exceeding 87,000 acres, for the 111,385 acres patented to the State of Oregon, or its grantees, under the said Act of July 2, 1864.

The Act provides:

"That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior.

The Act further provides that in order to facilitate the exchange and the development of the lands to be so taken thereunder—

"there may also be selected in like manner and as part of [fol. 21] the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may prescribe thereunder. And when such exchange is effected patents for the lands so selected and approved shall issue therefor."

XIX

Thereafter the Secretary of the Interior concluded an agreement with the California & Oregon Land Company for an exchange of lands, accepting from the Company a deed which restored to defendant, for plaintiffs' benefit, the title to 111,408.08 acres of Klamath Reservation lands, erroneously patented under the Act of July 2, 1864, but granting to the Company, in return therefor, the right to demand patents for 87,000 acres of other, and vastly more valuable, lands lying within plaintiffs' Reservation, approximately all of which 87,000 acres have since been patented to the Company, as hereinafter shown.

XX

Of the 87,000 acres accorded by the Secretary of the Interior to the Company under said agreement, 61,550.82 acres were selected by the Company, and the selection approved by the General Land Office, on October 22, 1906; 23,669.01 acres were selected and the selection so approved June 16, 1910, leaving a balance of 1,780.17 acres to be selected, the disposition of which is at the present time to plaintiffs unknown.

[fol. 22] The lands so selected by, and patented to, the California & Oregon Land Company, under the last named agreement, were and are, for the most part, covered with a heavy growth of valuable pine timber, estimated at approximately 2,000,000 thousand feet, reasonably worth $3.00 a thousand, or $6,000,000.00.

XXI

The agreement with the California & Oregon Land Company for exchange of lands, having been concluded as aforesaid, and patents for 61,550.82 acres of other Reservation lands, having been issued by defendant to the Company in 1906, the Secretary of the Interior recommended to Congress that an appropriation of $108,750 be made to plaintiffs for the 87,000 acres of their lands taken to settle the demands of the California & Oregon Land Company.

In his recommendation, the Secretary says:

"It may be difficult to determine the exact value of the Indians' right, but certainly it is worth $1.25 an acre, and

I have, therefore, caused a draft of an item to be prepared to compensate them for the lands taken by reason of the transactions under consideration at the rate of $1.25 an acre, which is enclosed.

"Few Indians are as deserving as the Klamaths and few have had as just cause to complain of the delays that have occurred in settling their claims. I, therefore, earnestly urge that this measure become law."

XXII

Thereafter by the Act of April 30, 1908 (35 Stat. 70, 92), there was appropriated by Congress the said sum of $108,- [fol. 23] 750 to pay plaintiffs for the 87,000 acres of land so conveyed to the California & Oregon Land Company, on condition that they "execute a release of any claims or demands of every kind against the United States for the land involved."

This sum was far below the reasonable value of the lands, and plaintiffs accepted it only under the strongest protest, and upon the assurances of the Superintendent in charge of the Agency that in doing so they did not preclude themselves from recovering from the Government of the United States any difference between the sum so received and the reasonable value of their lands.

XXIII

Plaintiffs further allege that shortly after April, 1908, they began to renew their appeals to the Government for an equitable settlement of their tribal claims growing out of the erroneous issue of patents to lands within their reservation and of the erroneous boundary surveys.

These appeals were at first made to the Secretary of the Interior, directly or through their Agency Superintendent, by letter, petition, memorial, and in person.

Finally, plaintiffs, failing in these efforts, decided to appeal to Congress for assistance. Delegates were chosen by tribal councils and were sent to Washington, year after year, at heavy expense, with the result that at the 66th Congress, 2d Session, the Act (41 Stat. 623) was passed authorizing plaintiffs to submit their claims, legal and equitable, to this court, the act, in its terms, providing:

[fols. 24-37] "Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein,

both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions."

Under this Act plaintiffs submit their claim herein set forth, alleging that by reason of the exchange of their reservation lands with the California & Oregon Land Company, and the conveyance to the Company of 87,000 acres of plaintiffs' most valuable lands, they are entitled to have and recover $6,000,000, less any part of the said appropriation of $108,750 that has been paid to them or used for their actual benefit.

Wherefore, plaintiffs pray judgment for the sum of $5,891,250 together with such other and further sums as, upon a hearing, may be found due them for the value of the said 87,000 acres of land.

The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, by Daniel B. Henderson, Attorney of Record. C. M. O'Neill, John Irwin, G. Carroll Todd, of Counsel.

Duly sworn to by Daniel B. Henderson. Jurat omitted in printing.

[fol. 38] II. General Traverse—Filed July 22, 1925

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission of Case

On May 8, 1934, this case was argued and submitted on merits by Mr. G. Carroll Todd, for the plaintiffs, and by Mr. Wilfred Hearn, for the defendants.

IV. History of Proceedings

On November 5, 1934, the court filed special findings of fact, conclusion of law and entered a judgment dismissing the petition, with an opinion by Booth, Ch. J.

[fol. 39] On November 24, 1934, the plaintiff filed a motion for new trial and to amend findings.

On November 28, 1934, the defendant filed a motion to amend special findings of fact.

On April 8, 1935, the court entered the following order on said motion:

Order

This case comes before the court on the plaintiffs' motion for a new trial and on the defendant's motion to amend findings.

On consideration thereof it is ordered this 8th day of April, 1935, that said motion for new trial be and the same is denied. The motions to amend findings are allowed in part and overruled in part. The former findings are withdrawn and amended findings this day filed—the judgment and opinion to stand.

[fol. 40] V. **Amended Special Findings of Fact, Conclusion of Law and Opinion of the Court by Booth, Ch. J.**—Filed April 8, 1935

Mr. G. Carroll Todd for the plaintiffs. Messrs. Daniel B. Henderson, John Irwin, and C. M. O'Neill were on the briefs.

Mr. Wilfred Hearn, with whom was Mr. Assistant Attorney General Harry W. Blair, for the defendant. Mr. George T. Stormont was on the briefs.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Amended Special Findings of Fact

I

An act of Congress, approved May 26, 1920, 41 Stat. 623, provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstand-[fol. 41] ing lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recov-

ery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

"Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

"Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause."

[fol. 42]

II

In 1864 the plaintiffs held by immemorial possession a large area of land, over 20,000,000 acres, located in what are now the States of Oregon and California. Their title was not disputed.

III

By an act of Congress approved March 25, 1864, the President was authorized to conclude a treaty with the plaintiffs "for the purchase of the country occupied by them."

IV

On October 14, 1864 (16 Stat. 707), a treaty was concluded between the plaintiffs and the United States for the cession of their lands to the United States. Article I of that treaty is in part as follows:

"Provided, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians [and] held and regarded as an Indian reservation, * * * and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: Provided, also, That the right of way for public roads and railroads across said reservation is *guaranteed*. [reserved] to citizens of the United States."

Article XI of the treaty provides as follows:

"It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty."

V

By an act approved July 2, 1864, Congress granted to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of the

road, with the proviso, "that any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted." On October 24, 1864, the Legislature of Oregon accepted this grant and assigned it to the Oregon Central Military Road Company, which undertook to construct the road. The right of the State to make such an assignment was recognized by the act of Congress of June 18, 1874.

VI

In 1867, 1871, and 1873, pursuant to the act mentioned in the finding next preceding, patents were issued to the State of Oregon and the Oregon Central Military Road Company for 402,240.67 acres of land, which, by intermediate conveyances, ultimately became vested in the California & Oregon Land Company (United States v. Ore. Cent. Mil. Road [fol. 43] Co., 140 U. S. 599, 617, 620; United States v. Calif. & Ore. Land Co., 148 U. S. 31, 34). Of these 402,240.67 acres, 111,385 acres, exclusive of land required as a right of way for the road, were within the admitted boundaries of the lands reserved to the plaintiffs by the treaty of October 14, 1864.

VII

By an act approved March 2, 1889, Congress directed the Attorney General to bring suit to forfeit the grants of lands under the aforesaid act of July 2, 1864, for noncompliance with the conditions of the grants, "saving and preserving the rights of all bona fide purchasers of either of said grants * * * if any such there be."

The Attorney General brought the suit, alleging as grounds for forfeiture that the road was not in fact constructed, that the certificates of the Governor of Oregon on which the patents to the lands were issued were fraudulently obtained, and that the California & Oregon Land Company and its transferors took conveyances of the lands with knowledge of these facts. It was decided, however, that the California & Oregon Land Company was a purchaser in good faith and that its title was valid. (United States v. Calif. & Ore. Land Co., supra.)

Thereafter another suit was brought by the United States against the California & Oregon Land Company to recover that part of the lands in question which was within the Klamath Indian Reservation, on the ground that by the terms of the act of July 2, 1864, those lands were expressly excepted from the operation of the grant. The Supreme Court decided that this issue could have been raised in the first suit and therefore was res adjudicata, and dismissed the bill. (United States v. Calif. & Ore. Land Co., 192 U. S. 355.)

The lands thus lost to the plaintiffs were located in a part of their reservation which had been allotted to the members of the tribe in severalty.

VIII

In a report to Congress on this matter the Secretary of the Interior said:

"The last decision of the Supreme Court was based on the contention in behalf of the Indians that they were not made parties to the previous suits. The only way they could come into court was through the United States, and the Supreme Court very justly said that this and the preceding suits being proceedings in equity, the United States could not continue indefinitely bringing such suits. In other words, that the entire case should have been disclosed in the original proceedings. No matter what may be said as to the merits of the Indians' claim to the land, it was not passed on because of the failure of the Government to proceed properly. But the Government's right was fully litigated, and the Indians are debarred from further proceedings.

"The Indians have complained bitterly and have made, and continue to make, claim for compensation for the lands taken from them. I believe that their claim is just and that they should have reasonable compensation, and I do not believe it fair that they should be compelled to wait for a long term of years and finally employ attorneys to prosecute their claim."

[fol. 44]

IX

By an act approved March 3, 1905, Congress directed the Secretary of the Interior to ascertain the reasonable value

of these lands, describing them as lands "embraced within the boundaries of the original survey of the Klamath Indian Reservation", and also to ascertain for what price the California & Oregon Land Company would convey them back to the United States, or on what terms it would exchange them for other lands within the boundaries of the reservation not theretofore allotted to individual members of the Klamath Tribe.

X

The Secretary of the Interior having made no report in the meantime, Congress, by an act approved June 21, 1906, authorized the Secretary to give in exchange for these lands unallotted lands within the Klamath Reservation not exceeding 87,000 acres.

Under this authority the Secretary, on July 26, 1906, concluded an agreement with the California & Oregon Land Company, pursuant to which these lands were conveyed back to the United States by deed dated August 22, 1906, and in return the United States conveyed to the California & Oregon Land Company 87,000 acres of other lands, not allotted, within the Klamath Reservation.

This was done without the knowledge or consent of the plaintiffs and without making compensation.

XI

These 87,000 acres were covered, for the most part, with a heavy growth of merchantable pine timber. A cruise of the timber made in 1906 at the time of the exchange showed approximately 1,713,000,000 feet.

In 1906 the value of this tract to the Indians residing on the reservation, under the title possessed by them, was $2,980,000.

XII

On November 2, 1907, the Secretary of the Interior sent to the Secretary of the Treasury a tentative draft of a bill appropriating $108,750.00 to be paid the plaintiff Indians as compensation for the taking of the 87,000 acres. In a letter accompanying the draft of this bill the Secretary said:

"It may be difficult to determine the exact value of the Indians' right, but certainly it is worth $1.25 an acre, and

I have therefore caused a draft of an item to be prepared to compensate them for the lands taken by reason of the transactions under consideration, at the rate of $1.25 an acre, which is inclosed."

This bill and letter were thereafter forwarded by the Secretary of the Treasury to the Speaker of the House of Representatives.

By act approved April 30, 1908 (35 Stat. 70, 92), Congress appropriated the sum of $108,750 in payment to plaintiffs for the 86,418.06 acres of land taken from the reservation as aforesaid. That act is as follows:

"That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath Agency for the lands conveyed [fol. 45] to the California and Oregon Land Company, in accordance with the provisions of the act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: Provided, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved."

XIV

The Commissioner of Indian Affairs transmitted a form of release in the language of the statute to the Superintendent of the Klamath Agency with the instruction, "This release should be executed in your presence by a majority of the Indians on the reservation and should be certified to by you as the action of such majority."

XV

[1] In 1908 the total Indian population of the Klamath Reservation was 1,038, of whom 640 were adults (287 men and 353 women). The adult males were alone allowed to vote

in Indian councils. The Superintendent of the reservation called for a council of the Indians to assemble at the general agency headquarters on December 5, 1908, for the purpose of considering compliance with the act of April 30, 1908. The Indians were duly notified of this council in the usual way and for a sufficient time in advance of the same to bring such notice to them.

XVI

The council assembled in pursuance of the notices and was attended by 200 or more Indians. The Superintendent of the reservation presided and explained to the Indians the terms of the act of 1908 and what they would have to do to get the money appropriated. An Indian interpreter followed him and interpreted in their native tongue what he had said to them. Some opposition to signing the required release developed, but in the end the release was signed by 100 or more Indians present. The Superintendent was not in accord with the amount appropriated to compensate the Indians, and he neither did nor said anything to mislead the assembly. He had recommended the appropriation of a much larger sum.

XVII

The same proceedings as noted in finding XVI in a general way were observed at a place called Yainax, where a subagency of the reservation had been established, and additional signatures to the release were obtained. Yainax was some forty or fifty miles distant from the general agency, and Indians from this section of the reservation rarely ever attended councils at the general agency headquarters. The release was signed by 150 adult male members of the Indians on the reservation.

[fol. 46] XVIII

On January 6, 1909, the Secretary of the Interior received from Horace G. Wilson, the agency superintendent of plaintiffs' reservation, a release signed by 150 adult male Indians of the reservation, the release being as follows:

"Whereas by an item in the Indian Appropriation Act approved April 30, 1908 (Public, No. 104), there is ap-

propriated the sum of one hundred eight thousand seven hundred and fifty dollars ($108,750.00), or so much thereof as may be necessary to pay the Indians of the Klamath Agency for the land conveyed to the California and Oregon Land Company, in accordance with the provisions of the act of June 21, 1906 (34 Stat. L. 325-368), which sum is to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purpose as the Secretary of the Interior may prescribe; and

"Whereas it is provided in said act—

"That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved:

"Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved."

XIX

Upon the acceptance of the foregoing release by the Secretary of the Interior as a sufficient compliance with the provisions of the act of April 30, 1908, the said sum of $108,750 was placed in the Treasury to the credit of plaintiffs, and no claim has been made by plaintiffs for compensation in addition to that specified in said act and release pursuant thereto, save and except through the petition herein filed.

XX

In 1906 the timber on the 87,000-acre tract was worth at least $1.50 per thousand feet. The Commissioner of Internal Revenue in determining the value of the timber as of March 1, 1913, for income-tax purposes, valued the 87,000 acres at $3,550,000. In 1918 the Oregon Land & Live Stock Company, the then owners of the lands, sold the same to the Long-Bell Lumber Company for $3,700,000. The timber on the tract was as good as that in any section of this country, both from the standpoint of quality and logging facilities.

XXI

The United States is entitled to set-offs, under the jurisdictional act, of $1,978,431.24. There is not included in the set-off the sum of $242,932.94 expended for the benefit of the Indians subsequent to the jurisdictional act of 1920, and also there is omitted from the defendant's counterclaim all sums expended for the benefit of the Indians under treaty provisions during the periods the United States was obligated to disburse the same.

[fol. 47] There is also eliminated from the defendant's counterclaim the sum of $11,210.51 for medical supplies furnished the Indians. The treaty provided that they should be furnished a doctor.

The sum of $172,275.83 is likewise deducted from the defendant's counterclaim, the amount expended for the benefit of the Moadoc Indians while living on the Quapaw Reservation in Indian Territory.

The sum of $26,290.56, expended for building materials, hardware, paints, oils, and glass, is also deducted from the defendant's counterclaim as being required to be disbursed under the treaty.

The expenses of surveying the Klamath Indian Reservation and allotting lands to certain allottees, amounting to $63,115.78, are not chargeable to the Indians under the treaty, and the sum of $11,732.62 is a liability of the Government under Article VI of the treaty.

The sum of $12,589.89, used to purchase agricultural implements, feed for livestock, and seeds for planting, is not proved to have been exclusively for the benefit of the Indians, and falls within the terms of the treaty.

The total sum of the defendant's counterclaim is $2,652,181.49, and from this sum the court subtracts $673,750.25, leaving a balance of $1,978,431.24 chargeable to the Indians.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

OPINION

BOOTH, Chief Justice, delivered the opinion of the court:

The special jurisdictional act of May 26, 1920 (41 Stat. 623), which refers this Indian case to the court, is found in finding I. One provision of the act is of vital importance in the decision of the case and will hereafter be quoted in full and discussed; it is not essential to set forth in this opinion the entire act.

The petition in this case was filed on May 23, 1925. Evidence on the part of the plaintiffs was not completed until July 25, 1933. The testimony of some fifty or more witnesses was taken by the parties during the years 1928, 1930, 1931, and 1932. The last report of the Treasury Department was filed August 15, 1932. The report of the General Accounting Office, involving a detail computation and examination of all expenditures and appropriations made for and on behalf of the plaintiffs from 1864 to 1920, was filed December 7, 1933, a document voluminous and indispensable to the disposition of the case, made so by the right of the defendant to interpose a counterclaim, and one which could not be unduly expedited.

On five different dates the court on its own motion placed this case upon the trial calendar for trial, and upon each date, except the last, a motion was made to remand the case to the general docket because not then ready for trial, both parties conceding the fact. The case being finally briefed was placed on the May calendar and argued and submitted May 8, 1934. We recite these facts as demonstrative of the inherent difficulties which attend litigation of this character and illustrative of the factor of delay in their disposition. The case is one of importance, involving acute disputation as to certain facts and important legal questions.

[fol. 48] The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians claimed by occupancy an immense tract of land located in what are now known as the States of Oregon and California. March 25, 1864 (13 Stat. 37), Congress authorized the President to negotiate and if possible conclude, a treaty with them. October 14, 1864 (16 Stat. 707), a valid treaty was concluded, by the terms of which the plaintiff Indians ceded to the United States all of their lands theretofore claimed by them, except a defined and delimited tract of about 2,500,000 acres in the State of

Oregon set aside to them as a reservation, known as the Klamath Indian Reservation and upon which they now reside.

On July 2, 1864, about four months prior to the conclusion of the treaty of October 14, 1864, Congress had passed the donation act, found in 13 Stat. 355. This statute donated to the State of Oregon alternate sections of public lands, three sections in width, on each side of a proposed military road which the State intended to construct from Eugene City on its western boundary extending across the State to the eastern boundary thereof.

The State of Oregon accepted the grant as in aid of the construction of the road, and thereafter, on October 24, 1864 (18 Stat. 80), assigned to the Oregon Central Military Road Company all of the lands included in the grant, which company proceeded with the work of building the road, later, however, assigning and conveying to the California and Oregon Land Company all the rights and title to the lands involved, and this company completed the road. The United States in the years 1867, 1871, and 1873 issued to the road company patents for 402,240.67 acres of land covering the above donation.

Following the acquisition of title to the lands by the land company it was discovered that included within the acreage patented to it were 111,400.08 acres of Indian lands; i. e., lands which were included under the treaty of October 14, 1864, within the Klamath Indian Reservation, belonged to the Indians, and a substantial portion of which had been duly allotted to certain members of the tribe (34 Stat. 325). It had not been the intention of Congress to include within the donation of public lands any portion of the Klamath Indian Reservation, and when the mistake in so doing was discovered the United States set in motion exhaustive efforts to correct the error. Three suits were commenced by the United States against the land company in an effort to annul the patents to the Indian lands. This litigation, which extended over a long period of time and with respect to which we need only cite the result, is found in the following cases: United States v. Oregon Central Military Road Company, 140 U. S. 599; United States v. California and Oregon Land Company, 148 U. S. 31, and the final case involving the same parties, in 192 U. S. 355, wherein the title of the land company to all the lands included within the patents was confirmed and the issue put at rest.

The situation then in February 1904, as a result of the decision of the Supreme Court of that date, was that the Indians residing on the Klamath Reservation suffered a diminution of their reservation to the extent of 111,400.08 acres of land, and the allottees the loss of their allotments. Congress very promptly sought to rectify the error and injustice resulting from the donation act of July 2, 1864, and on March 3, 1905 (33 Stat. 1033), passed an act direct- [fol. 49] ing the Secretary of the Interior to ascertain the value of the 111,400.08 acres of Indian lands included within the donation act and discover for what price the California and Oregon Land Company would be willing to convey the same to the United States, or on what terms the land company would be willing to exchange the same for other unallotted lands within the reservation.

Eventually an exchange of lands was brought about, the land company conveying to the United States the 111,400.08 acres, thus restoring the same to the reservation and accepting in lieu thereof about 87,000 acres of unallotted and immensely valuable timberlands in another section of the reservation. This exchange was concluded on August 22, 1906, in accord with the provisions of the act of June 21, 1906 (34 Stat. 325, 368), and manifestly resulted in a diminution of the reservation to the extent of 87,000 acres of land. The act of June 21, 1906, supra, made no provision for the payment to the Indians for the taking of this tract of land.

On November 2, 1907, the Secretary of the Interior transmitted to the Secretary of the Treasury the draft of a bill appropriating $108,750 as compensation to the Indians for the loss of the 87,000 acres. On the same date the Secretary advised the Speaker of the House that the lands were "certainly worth $1.25 per acre." April 30, 1908 (35 Stat. 70, 92), Congress appropriated $108,750 to be paid the Indians for the lands, a proviso to the act stating "That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved."

In December 1908 the superintendent of the reservation assembled a council of the Indians at the general agency of the same. Ample notice of the council was given by deputizing the Indian police to proclaim the fact and by posting notices thereof. The Indian population of the reservation

on this date was 1,038, of whom 640 were adults (287 males and 353 females). Some 200 or more Indians responded to the call, and the superintendent in their presence explained the purpose of the meeting and what was essential for them to do if they wished to obtain the benefits of the appropriation. In addition to his address in English an Indian interpreter explained in their native tongue what the superintendent had said. Some opposition to signing the release appeared from a decided minority. The grievance uttered was not so much as to the inadequacy of the appropriation but was addressed to a fear that what was being done was not in accord with the wishes of the Department. At any rate, the one Indian as spokesman of the opposition finally signed the release, and it is certain that at least one hundred adult male Indians signed at this meeting.

The Klamath Reservation is in area extensive, and because of this fact a subagency had been established at the well-known place of Yainax on the reservation. The Indians residing at and near Yainax rarely visit or attend council meetings at the general agency some forty or fifty miles distant. The superintendent visited Yainax, and before an assembly of Indians there repeated the procedure at the general agency, with the result that the release was eventually signed by 150 adult male Indians. It may be, although extremely doubtful, that some Indians were approached individually with respect to the matter. The Indian testimony so indicates, but the room for error in [fol. 50] their testimony clearly demonstrates that they may be and probably are mistaken.

The superintendent certified to the Secretary of the Interior that the lease had been executed, and the same was thereafter approved by the Department. The appropriation being immediately available, the same was credited on the books of the Treasury and expended for the benefit of the Indians, and they accepted without protest or complaint the items for which it was expended.

One claim now prosecuted under the jurisdictional act is for just compensation for the 87,000 acres of land taken in 1906. To sustain a cause of action and avoid the legal consequences of the release given, the plaintiffs contend that the following provision of the jurisdictional act is in effect a waiver upon the part of the United States of a defense predicated upon the conclusiveness of the release

and that the same may not be pleaded as an estoppel to the suit. The provision reads:

"That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding the lapse of time or statutes of limitation, *and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions,* and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. * * * (Italics inserted.)

The concluding clause of the release of 1908 is as follows:

"Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved."

The plaintiffs obviously concede that, save for the alleged waiver of the same, the defense of estoppel was available to the United States. Many Indian cases are cited in the briefs. To review them separately would involve a repetition of familiar legal principles and a prolongation of this opinion to tedious length. The fundamental legal basis prescribed by the Supreme Court for the construction of special jurisdictional acts in Indian cases is concisely expressed in the Mille Lac Indian case, 229 U. S. 498, 500, as follows:

"The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians."

In Price v. United States and Osage Indians, 174 U. S. 373, 375, the Supreme Court said:

"The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we [fol. 51] cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, Schillinger v. United States, U. S. 163, 166, in which this court said: 'The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.'"

Tribal Indians may not sue the United States in this court except by special jurisdictional acts, and obviously all such litigation would be barren of results if the United States did not preclude the defense of the statute of limitations. In the Choctaw case, 19 C. Cls. 243, decided in 1881, Congress in the special act by words of indubitable meaning, i. e.: "Power is hereby granted the said court to review the entire question of differences de novo, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of eighteen hundred and fifty-five," waived the defense of estoppel which involved a previous award made to the Indians. Uniformly the court's jurisdiction has been limited to claims "growing out of treaties, agreements, and acts of Congress." The litigation has involved controversies with respect to the failure of the United States

to observe treaty stipulations, discharge contractual obligations, and comply with the provisions of acts of Congress.

A review of the many cases decided by this court discloses, we think, that when Congress intends to waive a defense it has left no room for doubt the intention. While it is true that special jurisdictional acts in Indian cases extend to the point of extreme liberality as to the subject matter to be adjudicated and involve large sums of money, nevertheless the court is not by implication to extend the scope of the act if in its opinion the language of the same does not warrant the construction. When Congress intends, as the cases indicate, to waive the effect of settlements and awards, apt language is used to accomplish the purpose. Delaware cases, 72 C. Cls. 483; Id. 525; 74 C. Cls. 368.

A precedent long ago established inhibits this court under special jurisdictional acts from adjudicating any Indian claims depending for their validity upon the setting aside or abrogation of any article of a treaty. United States v. Weld, 127 U. S. 51; Old Settlers case, 148 U. S. 427; Lone Wolf v. Hitchcock, 187 U. S. 553. Plaintiffs' contention embraces the necessity of setting aside a referendum settlement and trying the entire issue de novo. Congress was unwilling to consummate the payment until the Indians by a majority of the male adults had signified their satisfaction therewith, and the language of the appropriation act clearly and unmistakably discloses that it was to be not only a satisfactory but a final settlement for the lands taken. To revive a liability once satisfied and [fol. 52] expressly released exacts language in the act which leaves no room for doubt, and especially is this true when the contemporaneous policy of the United States was to effect, if possible, conclusive agreements with the Indians in making settlements.

Assuredly this clause of the special act is not meaningless. Congress in inserting it intended some remedial purpose. Payment upon a claim may be made without exacting a written release of the same, and when made may raise the issue as to whether it extinguishes the liability involved or was only a partial one. Indian controversies under special jurisdictional acts universally involve an alleged failure to accord the Indians what treaties, agreements, and

acts of Congress gave to them, and the instances are many where the cause of action involves payments made.

A settlement and release of a claim is something different in law from a "payment upon a claim." A release of a claim results in a legal relationship of the parties distinct from a payment upon or of a claim without signing a release. In many instances the Department of the Interior either disburses money to the Indians or deposits same in the Treasury to their credit, acting upon a settled conviction that by so doing they are discharging in full the liability of the United States under treaties, agreements, and acts of Congress, and the disbursements so made are accepted by the Indians and acquiesced in for a long period of time.

Subsequently a controversy arises as to whether the payments made as above, although accepted and acquiesced in as in full, were in fact and in truth sufficient in amount under the documents setting out the liabilities to discharge the same. Suits involving issues of this precise character are numerous in this court. One generation of Indians accepts payments without complaint; a succeeding one challenges them as not being in full. This, we think, is, as before observed, quite different from a transaction where the parties meet in council, discuss and determine a claim, and in accord with the congressional act offering the settlement accept the same and release the United States from all further or additional liability for the same. In one instance the act of payment emanates from an administrative officer of the United States; in the other it is the solemn proceedings of the parties themselves, and discharges an assumed liability.

Therefore it seems to us that what Congress intended by a waiver of the defense of estoppel predicated upon payments made upon a claim was not to preclude the United States from proving that a payment made discharged the liability. To establish this fact the burden was put upon the defense, and the fact of payment did not relieve the issue from proof upon the merits. It, we think, did not refer to a settlement, an extinguished liability, but to an outstanding claim.

In this case we have not only a payment made and accepted, but a written release, comprehensive in terms, which was intended to and did extinguish any existing liability.

No future claim could be based upon the transaction unless Congress waived the legal effect thereof. The issue here is not alone one of payment working an estoppel, but the setting aside of a release which admittedly closed the transaction and extinguished all liability under the claim. If Congress intended to nullify a release it would have used lan- [fol. 53] guage clearly evidencing that intention. In the choice of legal terms we cannot assume that Congress intended to set aside a release by using the words "payment upon a claim." Judicial precedents, quite familiar, limit the court in construing special jurisdictional acts to "the plain letter of the law conferring jurisdiction." In the Blackfeather case, 190 U. S. 368, 376, the Supreme Court said:

"As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do not, it will not be implied. Statutes of this nature extending the right to sue the Government will generally be strictly construed."

See also the Osage case, 174 U. S. 373, and Choctaw Nation case, 179 U. S. 494.

While not conclusive, another fact disclosing the extent to which Congress was willing to go in conferring jurisdiction upon this court in this case, as well as the subject matters before that body, is evidenced by the report of the House committee in charge of the same, a report also adopted by the Senate committee. In these reports this claim is not mentioned by the committees, and what is more, an extended memorial of the Indians setting forth their claims against the United States and praying for a special act to enable their prosecution, makes no reference nor mention whatever of a claim for compensation for the 87,000 acres of land involved in this case.

In addition to what has been said, the opinions of this court in the Creek Nation cases, 63 C. Cls. 270, 77 C. Cls. 226, as well as in the Delaware Indian cases, supra, with respect to construing special jurisdictional acts in Indian cases, are apropos. The court, without quoting the language, held that only such claims as grow out of treaties, agreements, or acts of Congress, come within the jurisdic-

tion conferred, and that the acts did not confer authority to abrogate a treaty, set aside its articles and award judgment accordingly, because obviously a claim could not grow out of a treaty if its origin were founded upon an abrogation of the treaty itself. In the Delaware cases Congress, in language which could not be misunderstood, conferred jurisdiction "to consider all such claims de novo." The claim in suit does not grow out of an agreement; it can only obtain validity by setting aside a release, a settlement.

In answer to the above the plaintiffs state: "The claim sued upon is not presented as a claim arising under any treaty or agreement but as one in the broad category of 'claims of whatsoever nature which the Klamath and Moadac Tribes of Indians * * * may have against the United States * * * for the failure of the United States to pay said Indians any money or other property due', i. e., money due them as just compensation for the taking of the 87,000 acres." The quotation from the jurisdictional act is not complete. The act recites, in addition to the above, that our jurisdiction shall extend to the "determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress." It was a law of Congress which effected the tranfer of the 87,000 acres of reservation lands, and it was another law of Congress which effected the settlement therefor. Congress, and Congress alone, possessed the authority to do what was done, and Congress was the only source from which the Indians could upon terms imposed receive [fol. 54] compensation. Save for acts of Congress, this claim would not have arisen. Lone Wolf v. Hitchcock, supra.

The plaintiffs challenge the validity of the release. The record, it is said, sustains the charge that it was not obtained "through the usual channels" observed by the Indians in considering matters of this sort, and that signatures thereto were obtained by duress. In addition to this, it is asserted with much confidence that the Indians possessed no knowledge as to the real value of the lands and were ignorant of the provisions of the release, which were not intelligently explained to them, and in any event it was not signed by a majority of the Indians because the women present at the council were not allowed to participate in or sign the same.

From time immemorial the tribal Indians assembled in council. Sometimes the assembly was for the purpose of observing Indian customs and practices in a spirit of celebration; at other times it was for the consideration of tribal affairs, and not infrequently business and celebration were combined. The Indians on the Klamath Reservation met in councils. They were called together in some instances upon their own motion, and upon other occasions by the superintendent of the agency. The United States in negotiating treaties assembled councils, and the statutes of the United States disclose repeated acts of Congress referred for ratification to Indian councils. In later times the Indian council has developed into more settled and established forms of procedure, and the United States, in the matter of legislation affecting Indian lands and funds, has proceeded largely upon the rule of obtaining the assent of the Indians to the legislation enacted. The purpose of so doing is apparent. To withhold from the Indians an opportunity of knowing and expressing their approval or disapproval of the legislation was not intended.

Some fifty Indian witnesses were examined by the plaintiffs. Without exception, they testify that no chairman or secretary of the council held on December 5, 1908, was elected; no proposition was put to a vote by the presiding officer; and that the superintendent of the agency as presiding officer not only did not allow the women present to participate in the meeting but stated to the Indians in substance, "that if they did not accept the $108,750.00 and execute the release in question, they would lose both the land and money—they would get nothing." The release, it is said, was not at this meeting signed by a majority of the Indians present, but signatures thereto were procured by circulating it among individual Indians and soliciting their signatures, many of whom signed without knowing what they were doing.

The burden of proof with respect to duress and misrepresentation proffered to invalidate an instrument under seal is upon the plaintiffs, and when signatories to such a document some nineteen or twenty years later testify with unanimity, and at a time when the prospects of a large judgment appear, that coercion and misrepresentation obtained to procure their signatures, the record thus made loses much if not all of its probative force and falls far short of

reaching that degree of proof essential to establish the charges made. Especially is this true when the release upon its face discloses that some seventy-four Indians signing the same did so by "thumb mark", and most if not all of the same Indians called as witnesses in this case [fol. 55] disclose no advancement in their ability to read or write English.

The failure to observe the details of procedure previously followed by the Indians in conducting a council is not fatal. The predominant questions are, first, was the subject matter to be discussed fully and fairly presented to the assembly; and second, did the Indians understand and know what they were doing? The Superintendent called the council in the usual way. He presided and presented the question of the payment of the money and the release fully and fairly. An interpreter selected by him explained the matter in their native tongue; that he did not resort to any unlawful practice to secure the assent of the Indians is manifest from the fact that he himself was not in sympathy with but opposed to the terms of the settlement. All he did, as he says, was to discharge his duty, and what he said to the Indians was in keeping with the proceedings. Each Indian witness produced by the plaintiffs concedes that knowledge of the fact that they were to receive the amount offered by the United States, in payment for the 87,000 acres taken, obtained. The gist of their evidence centers upon the fact that they relied upon the fairness of the United States to pay what the lands were worth to them, and acted without knowledge of the true value of the same, believing that failure to assent meant a loss of the money and the lands as well.

It is indeed an involved and perplexing problem to analyze a record of oral testimony such as we have here, a record which in practically all instances is incapable of contradiction from any other source than documentary evidence, and hold that because of the differences in experience, learning, congenital habits, and customs between the parties to the transaction, the volume of corroborated oral testimony is sufficient to overcome what positive and contemporary permanent records in writing disclose. At any rate, the method which Congress chose to adopt in consummating this transaction, as evidenced by the legislation, bears the seal of congressional approval as one adopted to

procure a fair, deliberate, and mutual settlement of the controversy. It is, of course, difficult to hold that each Indian signing the release knew precisely what he was doing; that many of them did is evident. Nevertheless, this court, as repeatedly held, is restricted to the rules of law and equity in adjudicating the case, and to the facts we are bound to apply the same. We think, as our findings show, that duress and misrepresentation in procuring the release are not sustained.

We have made the findings after a careful analysis of the record, but inasmuch as in our opinion the special jurisdictional act does not confer upon the court authority to determine the claim, we do not discuss the same. The petition will be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Green, Judge, concur.

[fol. 56] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 8th day of April, A. D. 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover.

It is therefore ordered and adjudged that the plaintiffs' petition be and the same is hereby dismissed.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RE OMISSION OF EXHIBITS TO PETITION—Filed April 24, 1935.

It is hereby stipulated and agreed that Exhibits 1 and 2 attached to the petition herein may be omitted from the printed record. Exhibit 1 is a copy of the Treaty of October 14, 1864, between the petitioners and the United States, and may be found in 16 Stat. 707. Exhibit 2 is a map which is not needed in the presentation of the case.

G. Carroll Todd, Counsel for Petitioners. Stanley Reed, Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND SUPPORTING BRIEF.

G. CARROLL TODD,
Counsel for Petitioners.

DANIEL B. HENDERSON,
C. M. O'NEIL,
JOHN IRWIN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 901

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Claims in this case, rendered April 8, 1935.

That these Indians have suffered a great wrong at the hands of the Government of the United States is indisputable on the face of the facts found by the Court.

A part of their lands in the State of Oregon, worth at the time under the title possessed by them $2,980,000 as found by the Court, Finding XI, was taken from them without their knowledge or consent by the Secretary of the Interior under authority of an act of Congress approved June 21, 1906, Ch. 3504, 34 Stat. 325, 368, and transferred to a pri-

vate land company, and all that they ever received in the way of compensation was a payment of $108,750.

To recover the balance of the just compensation due them they brought this suit under an act of Congress approved May 26, 1920, Ch. 203, 41 Stat. 623, printed in full in the Findings of Fact, I, authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath etc. Indians * * * may have against the United States, which have not heretofore been determined by the Court of Claims * * * *, for the failure of the United States to pay said Indians any money or other property due."

Solely on the ground that 150 adult male members of the Tribes, out of a total adult membership of 640 (287 males and 353 females), signed a paper purporting to accept the $108,750 in full payment and to release all claims against the United States for the land involved, the Court of Claims held this claim to be barred, notwithstanding that the matter was never submitted to a vote of the Tribes, and notwithstanding that the 150 Indians who signed the purported release were without authority to represent the Tribes and without knowledge of the value of the land, and notwithstanding, also, that the act of Congress itself expressly provides that "*any* payment which may have been made upon any claim so submitted shall *not* be pleaded as an estoppel," § 2. [Italics ours.]

Short Statement of the Case.

In 1864 these Indians held by immemorial possession over 20,000,000 acres of land in what are now the States of Oregon and California. Their title was not disputed. Finding II, R. 21.

In that year they ceded these lands to the United States by treaty, 16 Stat. 707, reserving however for their ex-

clusive use and occupancy a specified area, Art. I, which came to be known as the Klamath Indian Reservation.

Thereafter, in executing grants of land by Congress in aid of the construction of a road across the State of Oregon the Department of the Interior erroneously issued patents to the Oregon Central Military Road Company for 111,385 acres within the admitted boundaries of the Klamath Indian Reservation. Findings V, VI, R. 21-22.

Pursuant to an act of Congress, Ch. 377, 25 Stat. 850, the Attorney General brought suit to recover the 111,385 acres, charging that the patents had been obtained by fraud, but the suit was unsuccessful, the lands having passed to a purchaser in good faith, the California & Oregon Land Company. Finding VII, R. 22.

The 111,385-acre tract was located in a part of the Klamath Indian Reservation that had been allotted to members of the Tribes in severalty, Finding VII, R. 23, and they complained "bitterly," Finding VIII, R. 23.

By an act approved March 3, 1905, Ch. 1460, 33 Stat. 1033, Congress directed the Secretary of the Interior to ascertain the value of these lands, and also for what price the California & Oregon Land Company would convey them back to the United States, or on what terms it would exchange them for other lands within the Reservation not theretofore allotted to individual members of the Tribes.

Eventually, on August 22, 1906, under authority of the beforementioned act of Congress of June 21, 1906, Ch. 3504, 34 Stat. 325, 368, the Secretary of the Interior, without the knowledge or consent of the Tribes, concluded an agreement with the California & Oregon Land Company under which the 111,385-acre tract was conveyed back to the United States in exchange for 87,000 acres of "immensely valuable timber lands in another section of the Reservation." Finding X, R. 24; Opin., R. 31.

As before stated, in 1906 the value of the 87,000-acre tract to the Tribes, under the title possessed by them, was $2,980,000, as found by the Court of Claims. Finding XI, R. 24.

By an Act approved April 30, 1908, Ch. 153, 35 Stat. 70, 92, Congress appropriated $108,750 to be deposited in the Treasury to the credit of the Tribes upon the execution by them, "through the usual channels," of a release "of any claims and demands of every kind against the United States for the land involved." Finding XIII, R. 25.

So far as the findings show, no release was ever authorized or approved by any tribal action. While a general council of the members of the Tribes was called by the Superintendent of the Reservation to consider the matter, opposition developed, and no vote was taken. Findings XV, XVI, R. 25-26.

However, a release was signed at different times by 150 adult male members of the Tribes, Finding XVII, R. 26, out of a total adult Indian population of 640, of whom 287 were men and 353 women, Finding XV, R. 25, and thereupon the $108,750 was deposited in the Treasury to the credit of the Tribes, Finding XIX, R. 27.

The Indians testified without contradiction that they "relied upon the fairness of the United States to pay what the lands were worth to them, and acted without knowledge of the true value of the same, believing that failure to assent meant the loss of the money and the lands as well." Opin. R. 39-41.

On May 26, 1920, Congress passed the beforementioned act, Ch. 203, 41 Stat. 623, authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath and Moadoc Tribes of Indians and the Yahooskin Band of Snake Indians * * * may have against the United States, which have not heretofore been determined by the

Court of Claims * * *, for determination of the amount, if any, due said Indians from the United States

"under any treaties, agreements, or laws of Congress, or

"for the misappropriation of any of the funds of said Indians, or

"for the failure of the United States to pay said Indians any money or other property due." § 1.

It was further provided that the rights of the parties shall be determined "notwithstanding lapse of time or statutes of limitation," and that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset * * *, and that the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof." § 2.

Pursuant to this statute the present suit was brought to recover money due the tribes of the Klamath Indian Reservation as just compensation for the taking of the 87,000 acres of their lands, deducting, of course, the $108,750 already received.

The Court of Claims, as aforesaid, held the release to be a bar and dismissed the suit.

The Issues.

The petitioners maintain—

First, that the Act of May 26, 1920, in authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath etc. Indians * * * may have against the United States, which have not heretofore been determined by the Court of Claims * * *, for the failure of the United States to pay said Indians any money or other

property due," § 1, and in further providing that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," lifted the bar of the alleged release and opened the way for the determination of the present claim on the merits.

Second, that in any event the alleged release signed by 150 individual members out of a total adult membership of 640 was not binding on the Tribes, because not authorized or approved by vote of a majority in general council, or by other form of tribal action, and because signed under duress.

Reasons Relied Upon for Allowance of the Writ.

1. The Court of Claims erred in holding the claim sued upon to be not within the jurisdictional act.

2. The Court of Claims erred in holding that individual members of the Tribes, less than a fourth of the total adult membership, without authority to act for the Tribes, could surrender property rights belonging to the Tribes.

3. The Court of Claims erred in not holding that the members of the Tribes who signed the alleged release did so under duress.

4. The Court of Claims erred in its construction and application of the jurisdictional act in respect of items of set-off claimed by the United States.

5. The decision of the Court of Claims that the claim sued upon is not within the jurisdictional act is in conflict with the decision of this Court constructing the jurisdictional act in the case of the *Choctaw Nation* v. *The United States*, 119 U. S. 1, 30 L. Ed. 306.

6. The decision of the Court of Claims leaves the Indians of the Klamath Reservation without compensation, other

than the payment of $108,750, for lands taken from them without their knowledge or consent worth at the time under the title possessed by them $2,980,000.

7. Whether these "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith," *Carpenter* v. *Shaw*, 280 U. S. 363, 367, 74 L. Ed. 478, 481, shall continue to be deprived of the just compensation to which they are entitled, when Congress has authorized them to bring suit on "all claims of whatsoever nature • • • which have not heretofore been determined by the Court of Claims • • •, for the failure of the United States to pay said Indians any money or other property due," and at the same time has provided that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," and whether individual members of an Indian tribe may relinquish property rights of the tribe without being thereunto authorized by vote of a majority in a general council, are questions of general importance in the relations between the United States and the Indian tribes. Compare *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 71 L. Ed. 294, where certiorari was granted.

8. The provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," occurs in other acts of Congress authorizing suits by the Indian tribes in the Court of Claims, for example, the Act of December 17, 1928, 45 Stat. 1027; the Act of February 20, 1929, 45 Stat. 1249; the Act of February 23, 1929, 45 Stat. 1256; the Act of February 28, 1929, 45 Stat. 1407; the Act of December 23, 1930, 46 Stat. 1033; the Act of March 3, 1931, 46 Stat. 1487; the Act of April 25, 1932, 47 Stat. 137. The provision has never been construed by this Court, nor by the Court of Claims except in this case, and it is important that its meaning be settled.

9. The opinion of the Court of Claims states, Rec. 29:

> "The case is one of importance, involving acute disputation as to certain facts and important legal questions."

And the provision of the jurisdictional act giving either party an appeal to this Court as a matter of right, while no longer operative after the Act of February 13, 1925, Ch. 229, § 3 (b) (c), 43 Stat. 936, 939, changing the method of reviewing decisions of the lower courts, nevertheless shows that Congress considered the case one of general importance.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket, No. E-346, the *Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Plaintiffs, v. The United States of America, Defendant,* and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE KLAMATH AND MOADOC TRIBES AND
YAHOOSKIN BAND OF SNAKE INDIANS,
By G. CARROLL TODD,
Counsel for Petitioners.

DANIEL B. HENDERSON,
C. M. O'NEIL,
JOHN IRWIN,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Claims together with its amended special findings of fact and conclusion of law are in the printed record beginning at page 18. The opinion has not yet been officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under § 3 (b) of the Act of Congress approved February 13, 1925, Ch. 229, 43 Stat. 936, 939.

The case was first decided November 5, 1934. R. 18. On November 24, 1934, plaintiffs moved for a new trial and to amend the special findings of fact, and on November 28, 1934, the defendant moved to amend the special findings of fact. R. 18.

On April 8, 1935, an order was entered overruling the motion for a new trial and allowing in part and overruling in part the motions to amend the findings, R. 18, and on the same day judgment was entered dismissing the petition. R. 41.

Statement of the Case.

The case is stated in the petition. [illegible]e.

Specification of Errors.

The Court of Claims erred—

1. In holding the claim sued upon to be not within the jurisdictional act.

2. In holding that a majority of the male adult members of the petitioning Tribes, by signing a release, could surrender property rights belonging to the Tribes without

the authorization of a general council of the members of the Tribes.

3. In not holding that the members of the Tribes who signed the alleged release did so under duress.

4. In construing and applying the jurisdictional act in respect of items of set-off claimed by the United States on account of expenditures for administration, enforcement of the laws, and police, including agency buildings, incidental agency expenses, and pay of Indian agents, interpreters, judges of the Indian courts, and miscellaneous employees, and pay and equipment of Indian police; for erection and repair of flour mill, manual labor school, saw mill, and hospital; for Indian school and agency buildings; for tools and materials for blacksmith shop, carpenter shop, flour mill, saw mill, and wagon and plow-maker shop; for books and stationery, manual labor school; for pay of blacksmith, carpenter, farmer, miller, physician, sawyer, superintendent of farming, teachers, and wagon and plow-maker; for subsistence; for transportation by carrier; and for education of children of the Tribes at schools off the Reservation.

Question Presented.

The primary question is whether the claim of the petitioners for just compensation for land taken from them under authority of an Act of Congress, worth at the time, as found by the court, $2,980,000, comes within the scope of the jurisdictional act, or whether the claim is barred by acceptance of a payment of $108,750 and the signing of a release by 150 adult male members of the Tribes out of a total adult membership of 640 (287 men and 353 women) without the authorization of a general council of the members of the Tribes.

Points of Argument.

I. The jurisdictional act removes the bar of the alleged release and reopens the claim for determination on the merits.

II. The alleged release was not the act of the Tribes of the Klamath Reservation and therefore was ineffective as a surrender of any rights or claims of the Tribes.

III. The Indians who signed the alleged release did so under duress.

THE ARGUMENT.

Point I.

The jurisdictional act removes the bar of the alleged release and reopens the claim for determination on the merits.

The jurisdictional act submits to the Court of Claims "all claims of whatsoever nature which the Klamath Indians • • • may have against the United States, *which have not heretofore been determined by the Court of Claims,* • • • for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due," § 1, with power "to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon," § 1; and it waives the defenses of limitations and estoppel against such claims, directing that the Court "settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, *and any payment which may have been made*

upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an off-set * * *." § 2. [Italics ours.]

Save for the exception of claims heretofore determined by the Court of Claims, the act could be no broader, and in making that specific exception Congress itself has recognized that the description of the claims authorized to be submitted was so comprehensive as to admit of no exception unless expressly made.

Had Congress intended to except also claims in respect of which the Indians had given or purported to give a release or receipt in full it must be presumed that it would have been equally explicit in saying so.

In addition, the jurisdictional act expressly provides that—

> "*any* payment which may have been made upon any claim so submitted *shall not be pleaded as an estoppel,* but may be pleaded as an off-set * * *." § 2. [Italics ours.]

Unless this provision shall be construed as applicable to a payment made and accepted at the time as payment in full it would mean nothing, since, of course, in no event would acceptance of a partial payment operate as an estoppel.

Any other construction of the jurisdictional act, moreover, would give an unconscionable effect to the provision that "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians." Except in return for a general reopening of the claims of these Indians for adjudication on the merits, it is unthinkable that Congress should have taken back everything the United States had ever given them at any time as a condition of allowing them to sue the United States to recover money the United States owed them. In other words, the evident purpose—putting out of

view claims already adjudicated by the Court of Claims—was to arrive at a just settlement *de novo*, forestalling all pleas in bar based on estoppel or limitations on the one side or on the irrevocability of absolute gifts on the other.

If the language of the jurisdictional act had left the matter in any doubt, which, as we think, it does not, the doubt would be removed by the Reports of the Committees on Indian Affairs of the House of Representatives and the Senate recommending the passage of the act. H. Rep. No. 672, 66th Cong., 2nd Sess.; S. Rep. No. 548, 66th Cong., 2nd Sess.

While the act is not limited to any specific claim or claims, in pressing for its passage the spokesmen for the Indians concentrated upon a long-standing claim growing out of a boundary controversy. *Ibid.*

In an act approved June 10, 1896, Ch. 398, 29 Stat. 321, 342, Congress had taken cognizance of a claim of the Indians of the Klamath Reservation that by an erroneous survey they had been deprived of lands within the boundaries of their Reservation as defined in the Treaty of October 14, 1864, 16 Stat. 707, and had authorized the President to appoint a commission to determine the correct location of the boundaries according to the terms of the Treaty. Later in the same year, 1896, the Commission made a report determining the boundaries of the Reservation in accordance with the terms of the Treaty, and finding that a large area had been excluded from the Reservation by an erroneous survey of the boundaries in 1871. H. Rep. No. 672, 66th Cong., 2nd Sess., p. 7.

Thereafter, under authority of an act of Congress approved July 1, 1898, Ch. 545, 30 Stat. 571, 592, the Secretary of the Interior concluded an agreement with the Indians dated June 17, 1901, subject to ratification by Congress, in which the Indians ceded to the United States the land found to have been excluded from their reservation

by the erroneous survey, 621,824 acres, H. Rep. No. 672, 66th Cong., 2nd Sess., p. 8, and the United States in consideration therefor, agreed to pay them $537,007.20, "*in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in* 1871." Art II. [Italics ours.]

This agreement was set forth and ratified in an act of Congress approved June 21, 1906, Ch. 3504, 34 Stat. 325, 367-368, and the sum of $537,007.20 was appropriated to be paid the Indians in accordance with its terms, 34 Stat. 368.

Here then was an agreement between the Indians of the Klamath Reservation and the United States entered into with all the formalities of a treaty in full settlement of all claims growing out of the boundary dispute.

Now, as before stated, these were the claims most urged when the jurisdictional act was under consideration, and chief among the claims set forth in the Report of the House Committee on Indian Affairs as the occasion for recommending passage of the act, H. Rep. No. 672, 66th Cong., 2nd sess., pp. 7-15, *and the Committee not only knew of the settlement agreement of June* 17, 1901, *but copied it in full in its Report, Ibid.*, pp. 8, 13, 19. The bill having passed the House, it was reported favorably by the Senate Committee on Indian Affairs, with a reference to the Report of the House Committee, S. Rep. No. 548, 66th Cong., 2nd sess., so that the Senate Committee also had knowledge of the settlement.

So, we repeat, if the language of the jurisdictional act had left the matter in any doubt, the legislative history makes it clear beyond question that Congress intended the act to include claims which had been the subject of prior settlement agreements between the Indians and the United States as well as unsettled claims.

In *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. Ed. 306, the Act of Congress of March 3, 1881, under which the suit was brought, authorized the Court of Claims "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon," with power "to review the entire question of differences *de novo*." 119 U. S. 2, 20 L. Ed. 306. One group of claims asserted in the suit was for failure of the United States fully to perform its obligations under Article 14 of the Treaty of 1830. 119 U. S. 5, 30 L. Ed. 307. However, the Choctaws had previously received from the United States a payment of $872,000 in respect of these claims, and had executed, as the act of Congress appropriating the money required, "a final release" of such claims, and the United States, just as in the present case, pleaded this release in bar on the theory that only *unsettled* claims came within the jurisdictional act. 119 U. S. 14-15, 26, 43-44, 30 L. Ed. 310-311, 314, 320. As in the present case, the Court of Claims sustained the plea, 21 Ct. Cl. 59, 71, 101-104, but this Court reversed the decision, saying:

> "Under the terms of the act of March 3, 1881, in exercising the jurisdiction thereby conferred, the Court of Claims is empowered to review the entire question of differences *de novo*, which may be interpreted to imply that the whole matter was opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of the statutes referred to." 119 U. S. 29, 30 L. Ed. 315.

The jurisdictional act in the present case is equally broad. Power to hear and determine "all claims of whatsoever nature • • • for the failure of the United States to

pay said Indians any money or other property due," coupled with a waiver of the defenses of estoppel and limitations, is the equivalent of power "to review the entire question of differences *de novo.*"

Point II.

The alleged release was not the act of the Tribes of the Klamath Reservation and therefore was ineffective as a surrender of any rights or claims of the Tribes.

As regards tribal rights and property, an Indian tribe is not bound, of course, by the acts of individual members holding no authority to represent the tribe. Authority to bind the tribe in such matters is vested in a *general council* of the members. See *Choctaw Nation* v. *United States,* 119 U. S. 1, 18-19, 30 L. Ed. 306, 312; *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 317-318, 319-320, 71 L. Ed. 658, 659, 660. Acts of Congress also recognize the general council as the proper authority to bind the Indian tribes, and the Tribes of the Klamath Reservation in particular, in the disposition of tribal property. Opin. Ct. Cl., R. 39; Act of March 4, 1933, Ch. 275, § 1, 47 Stat. 1568. So, also, administrative practice, as shown by the instructions of the Commissioner of Indian Affairs to the Superintendent of the Klamath Reservation to call a general council in this case.

The Act of April 30, 1908, appropriating $108,750 to be paid the Tribes of the Klamath Reservation in settlement of their claims growing out of the taking of the 87,000-acre tract did not authorize any departure from this method. On the contrary it expressly provided for a release "through the usual channels," 35 Stat. 92.

The release here was *not* authorized or approved by any general council of the Tribes of the Klamath Reservation.

All that the findings of fact show is that the members of the Tribes were notified to assemble at the Agency Head-

quarters on December 5, 1908, for the purpose of holding a general council to consider acceptance of the provisions of the Act of April 30, 1908, Finding XV, R. 25-26; that about 200 Indians responded and the Superintendent of the Reservation explained the matter, Finding XVI, R. 26; that some opposition developed but in the end the release was signed by 100 or more of the Indians present, Finding XVI, R. 26; that additional signatures were obtained at a subsequent meeting in another part of the Reservation of Indians who seldom attended general councils at the Agency Headquarters, Finding XVII, R. 26; and that the release was signed by 150 adult male members of the Tribes, in all, Finding XVII, R. 26, out of a total adult membership of 640—287 men and 353 women. Finding XV, R. 25.

But the 150 signatures were not all obtained at these two meetings. Nor do the findings so state. Fearing that such might be inferred from the context, the petitioners requested that this finding be clarified, citing the testimony of the Superintendent himself. To this the respondent replied that "the Court did *not* find that the 150 signatures were obtained at the two meetings." Defendant's Objections to Plaintiffs' Motion for New Trial and to Amend the Special Findings of Fact and Make Additional Ones, p. 5. The parties being in agreement as to the meaning and effect of the finding on this point, the Court made no change in it.

Thus it is apparent that the alleged release was never voted on or otherwise authorized or approved at a general council of the Tribes of the Klamath Reservation.

The petitioners asked the Court below to find, in accordance with the uncontradicted evidence, oral and documentary, that a general council of the Tribes of the Klamath Reservation is a meeting of the members of the Tribes, pursuant to call, at which a chairman and a secretary are

elected from the membership and votes taken and minutes of the proceedings kept; that at the meetings here in question no chairman was elected, and no secretary, and no vote was taken on the proposition to accept the $108,750 in settlement of the claims growing out of the taking of the 87,000-acre tract, or on any other matter, and no minutes of the proceedings were taken down or kept.

The defendant objected to these requests on the ground of immateriality, and the Court ignored them, saying:

> "The failure to observe the details of procedure previously followed by the Indians in conducting a council is not fatal." R. 40.

But the very purpose of a general council presided over by a member of the Tribe of the Tribe's own choosing, debating and taking votes in the presence of each other, with a secretary to record the votes and proceedings, is to insure a free and accurate expression of the tribal will.

Assuming, however, that the established methods of organizing and conducting a general council may be ignored, here it cannot even be argued that the signing of the release by 150 male adult members was the *equivalent* of a vote of the majority of the male adult members in general council assembled,[1] because, as just seen, the 150 signed at different times and places.

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[1] The finding that, "The adult males were alone allowed to vote in Indian councils," Finding XV, Rec. 25-26, we challenge as a matter of law, because without any supporting evidence. See *Hathaway & Co.* v. *United States,* 249 U. S. 460, 463, 63 L. Ed. 707, 709; *William Cramp & Sons* v. *United States,* 239 U. S. 221, 232, 60 L. Ed. 238, 243; *United States* v. *Clark,* 96 U. S. 37, 24 L. Ed. 696. However, assuming it to be true, a majority of the male adult members of the Tribes of the Klamath Reservation never voted in favor of the alleged release at any general council of the Tribes, as shown above.

It follows that their act in this regard was not the act of the Tribes and hence was ineffective to surrender tribal property rights.

In *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 71 L. Ed. 658, this Court decided that a deed to lands belonging to an Indian village executed by the captain of the village for himself and inhabitants of the village was void because its execution had not been authoried by the Indians "in council." 273 U. S. 317-318, 319-320, 71 L. Ed. 659, 660. There is no essential difference between the juridical status and characteristics of an Indian pueblo and an Indian tribe. *United States* v. *Chavez*, 290 U. S. 357, 361, 78 L. Ed. 360, 362; *United States* v. *Sandoval*, 231 U. S. 28, 58 L. Ed. 107; *Montoya* v. *United States*, 180 U. S. 261, 266, 45 L. Ed. 521, 523.

The contention of the Government that the release signed by 150 male adult members of the Tribes was binding on the Tribes, although not authorized or ratified at a general council, was based on the acceptance of the release by the Secretary of the Interior as a "sufficient" compliance with the provisions of the Act of April 30, 1908, Finding XIX, R. 27, and on an agreement dated June 17, 1901 (heretofore referred to in another connection), for the cession of certain lands by the Klamath Tribes to the United States which was executed on the part of the Indians by a majority of the male adults, and which it was said indicated what Congress meant by a release executed "through the usual channels." Government's brief below, pp. 788-790.

The acceptance of the release by the Secretary of the Interior was based, it must be assumed, upon the recital in the release that it was signed by "a majority of the Indians of the Klamath Reservation in council assembled," Finding XVIII, R. 27. This statement was incorrect. As shown above, the release was *not* signed by a majority of the In-

dians nor even by a majority of the male adult Indians *in council assembled.*

As to the agreement of June 17, 1901, *before* its execution the terms of the agreement and the method of execution on the part of the Indians were approved by vote of the Tribes *in council assembled.* H. Doc. No. 156, 56th Cong., 2nd Sess., pp. 28-29; H. Doc. No. 79, 57th Cong., 1st Sess., p. 1. As a precedent, therefore, this agreement refutes rather than confirms the Government's contention, which overlooks the distinction between the authorization or approval of an act or agreement by a body corporate or politic and the formality of execution.

Point III.

The Indians who signed the alleged release did so under duress.

The opinion of the Court of Claims states that some fifty Indian witnesses testified without exception that the Superintendent of the Reservation stated to the Indians in substance "that if they did not accept the $108,750 and execute the release in question, they would lose both the land and money—they would get nothing." (R. 39.)

The Superintendent did not deny making substantially that statement, but testified that "it was not given in the manner of a threat or anything of that sort, just simply to explain that if they wanted that money that they must sign."

The respondents requested the court below to find that this statement was made, but the request was ignored. Whether intended by the Superintendent as a threat or not, the respondents were entitled to a finding that the statement was made so as to be able to contend as a matter of law that the mere making of it, particularly considering

the "weak and defenseless" position of those to whom it was made, constituted duress.

There being no room for dispute that the statement was made, it is hoped that if this Court shall deem the statement material, the respondent will consent to have the fact that it was made treated as a part of the record for the purposes of the case in this Court, without the necessity of sending the case back for a finding on the subject, as was done under similar circumstances in *Ceballos* v. *United States,* 214 U. S. 47, 49-50, 53 L. Ed. 904, 905.

If a threat by officers of the Government to break a contract, coupled with a showing of damage if the threat were carried out for which the remedy afforded by the Courts would be inadequate, be duress, *Hartsville Oil Mills* v. *United States,* 271 U. S. 43, 48-49, 70 L. Ed. 822, 827, and *Hazlehurst Oil Mills etc. Co.* v. *United States,* 70 Ct. Cl. 334, 350-351, for greater reason must it be duress to state to members of an Indian tribe whose property has been taken from them, and who at the time had no remedy at all in the courts, that if they do not accept in settlement the amount offered they will get nothing.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 930

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,

Petitioners,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY MEMORANDUM FOR PLAINTIFFS.

The principal point made in opposition to the petition seems to be that fifteen other acts of Congress authorizing Indian tribes to sue the United States in the Court of Claims contain the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," and that it is unbelievable that

Congress intended to reopen settlements in all of those cases.

To which we reply:

1. The fact that this provision is contained in fifteen other acts of Congress passed since 1920 and has never been construed by this Court, nor by the Court of Claims except in the present case,[1] is itself a ground for allowing the petition in order that the meaning of the provision may be settled for the guidance of the Court of Claims in other cases.

2. There is nothing before the Court to show what settlement agreements there were in these other cases that might be affected by construing the provision in question as reopening claims for determination on the merits; nor to what

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[1] The Government cites the case of *Creek Nation* v. *United States*, 63 Ct. Cl. 270. But nowhere in the opinion in that case is the provision here in question discussed or even mentioned. The jurisdictional act there was limited to claims "arising under or growing out of any treaty or agreement," 63 Ct. Cl. 270, and the ground of the decision was that a claim which had been settled by an agreement was not a claim *arising under or growing out of an agreement*. 63 Ct. Cl. 272-273, 274. Here, on the other hand, the jurisdictional act extends to "all claims of whatsoever nature which the Klamath etc. Indians * * * may have against the United States," not only *under* any treaty or agreement or act of Congress, but "for failure of the United States to pay said Indians any money or other property due," excepting only claims heretofore determined by the Court of Claims. Compare *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 337, where the jurisdictional act was similar to that in the present case.

extent the reopening of settlements might be limited by other provisions of the jurisdictional acts.[1]

Besides, the choice between perpetuating an unconscionable settlement with an Indian tribe and suffering the inconvenience of reopening a claim for determination on the merits is a question of policy for Congress to decide in each case as it arises.

3. In the present case Congress has left no room for doubt as to its intention. The provision already quoted must be construed as waiving a defense based on a payment made and received by the Indians as payment in full or it means nothing, since in no event could a partial payment be pleaded as an estoppel.

4. The same clear purpose is shown by the words describing the claims authorized to be submitted—"all claims of whatsoever nature which the Klamath Indians * * * may have against the United States, *which have not heretofore been determined, by the Court of Claims,* * * * for determination of the amount, if any, etc., etc." The act could be no broader save for the exception of claims heretofore settled by adjudication of the Court of Claims. And, as heretofore observed, if Congress had intended to except also claims heretofore settled or attempted to be settled by agreement between the parties it must be presumed that it would have been equally explicit in saying so.

5. There is also the provision that, "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians,"

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[1] Of the fifteen jurisdictional acts referred to in the Government's brief ten are limited to claims *arising under or growing out of* any treaty or agreement or act of Congress, as in the case of The Creek Nation referred to in the preceding foot-note.

showing again that the purpose of the act was to arrive at a just settlement *de novo*, forestalling all pleas in bar based on estoppel or limitations on the one side or on the irrevocability of gifts on the other.

6. The jurisdictional act concededly embraces claims of the Klamath Indians growing out of an erroneous survey of the boundaries of their Reservation made in 1871, and yet, as heretofore shown, those claims had been previously settled in an agreement made in 1901 and ratified by Congress, and the committees of Congress which recommended the passage of the jurisdictional act had full knowledge of the settlement, showing again that the act was intended to include claims which had been the subject of prior settlement agreements as well as unsettled claims. Brief in support of petition, pp. 13-14.

In answer to this the Government in its brief suggests that the jurisdictional act does not permit the settlement agreement of 1901 to be reopened but only permits it to be construed. P. 12. But as the agreement expressly provided in Article II that the payment made was "in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in 1871," 34 Stat. 367, it is clear that the Court must go behind the settlement, and not merely construe it, in order to adjudicate the boundary claims.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

BRIEF FOR PETITIONERS.

Opinion Below.

The amended special findings of fact and conclusion of law and opinion of the Court of Claims are to be found at pages 18-41 of the record. The opinion has not yet been officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under § 3 (b) of the Act of Congress approved February 13, 1925, c. 229, 43 Stat. 936, 939.

The case was first decided November 5, 1934. R. 18. On November 24, 1934, plaintiffs moved for a new trial and to amend the special findings of fact, and on November 28,

1934, the defendant moved to amend the special findings of fact. R. 18.

On April 8, 1935, an order was entered overruling the motion for a new trial and allowing in part and overruling in part the motions to amend the findings, R. 18, and on the same day judgment was entered dismissing the petition. R. 41.

Question Presented.

The primary question is whether the claim of the Indians of the Klamath Reservation in Oregon (hereafter called the Klamath Indians or the Klamath Tribes) for just compensation for land taken from them under authority of an act of Congress, and worth at the time, as found by the Court of Claims, $2,980,000, comes within the scope of the jurisdictional act, or whether the claim is barred by acceptance of a payment of $108,750 and the signing of a release by 150 adult male members of the Tribes out of a total adult membership of 640 (287 men and 353 women) without the authorization of a general council of the members of the Tribes.

Statutes and Treaty.

The Act of May 26, 1920, c. 203, 41 Stat. 623, herein referred to as the jurisdictional act; the part of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 368, authorizing the taking of the lands in question; the part of the Act of April 30, 1908, c. 153, 35 Stat. 70, 92, appropriating the $108,750; and the Treaty of 1864 between the United States and the Klamath Tribes, 16 Stat. 707, are printed as an appendix. *Post*, 56-67.

Statement of the Case.

In 1864 the Klamath Tribes held by immemorial possession over 20,000,000 acres of land in what are now the States of Oregon and California. Their title was not disputed. Finding II, R. 21.

In that year they ceded these lands to the United States by Treaty, 16 Stat. 707, *post*, 60, reserving however for their exclusive use and occupancy a specified area, Art. I, which came to be known as the Klamath Indian Reservation. Finding IV, R. 21.

Thereafter, in executing grants of land by Congress in aid of the construction of a road across the State of Oregon, the Department of the Interior erroneously issued patents to the Oregon Central Military Road Company for 111,385 acres within the admitted boundaries of the Klamath Indian Reservation. Findings V, VI, R. 21-22.

Pursuant to an act of Congress approved March 2, 1889, c. 377, 25 Stat. 850, the Attorney General brought suit to recover the 111,385 acres, charging that the patents had been obtained by fraud, but the suit was unsuccessful, the lands having passed to a purchaser in good faith, the California & Oregon Land Company. Finding VII, R. 22.

The 111,385-acre tract was located in a part of the Reservation that had been allotted to members of the Tribes in severalty, Finding VII, R. 23, and they complained "bitterly," Finding VIII, R. 23.

By an act approved March 3, 1905, c. 1460, 33 Stat. 1033, Congress directed the Secretary of the Interior to ascertain the value of these lands, and also for what price the California & Oregon Land Company would convey them back to the United States, or on what terms it would exchange them for other lands within the Reservation not theretofore allotted to individual members of the Tribes.

Eventually, on July 26, 1906, under authority of the beforementioned act of June 21, 1906, c. 3504, 34 Stat. 325,

368, the Secretary of the Interior, without the knowledge or consent of the Tribes, concluded an agreement with the California & Oregon Land Company under which the 111,385-acre tract was conveyed back to the United States in exchange for 87,000 acres of "immensely valuable timber lands in another section of the Reservation." Finding X, R. 24; Opin., R. 31.

As before stated, in 1906 the value of the 87,000-acre tract to the Tribes, under the title possessed by them, was $2,980,000, as found by the Court of Claims. Finding XI, R. 24.

By the Act of April 30, 1908, c. 153, 35 Stat. 70, 92, Congress appropriated $108,750 to be deposited in the Treasury to the credit of the Tribes upon the execution by them, "through the usual channels," of a release "of any claims and demands of every kind against the United States for the land involved." Finding XIII, R. 25.

No release was ever authorized or approved by any tribal action. While a general council of the members of the Tribes was called by the Superintendent of the Reservation to consider the matter, opposition developed, and no vote was taken. Findings XV, XVI, R. 25-26.

However, a release was signed at different times by 150 adult male members of the Tribes, Findings XVI, XVII, XVIII, R. 26, out of a total adult Indian population of 640, of whom 287 were men and 353 women, Finding XV, R. 25. This was accepted by the Secretary of the Interior as a "sufficient" compliance with the Act of April 30, 1908, Finding XIX, R. 27, and thereupon the $108,750 was deposited in the Treasury to the credit of the Tribes, Finding XIX, R. 27.

The Indians testified without contradiction that they "relied upon the fairness of the United States to pay what the lands were worth to them, and acted without knowledge of the true value of the same, believing that failure to as-

sent meant a loss of the money and the lands as well." Opin., R. 40.

On May 26, 1920, Congress passed the jurisdictional act, c. 203, 41 Stat. 623, *post*, —, authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath and Moadoc Tribes of Indians and the Yahooskin Band of Snake Indians * * * may have against the United States, which have not heretofore been determined by the Court of Claims, * * * for determination of the amount, if any, due said Indians from the United States

> "under any treaties, agreements, or laws of Congress, or
> "for the misappropriation of any of the funds of said Indians, or
> "for the failure of the United States to pay said Indians any money or other property due; * * *." § 1.

It was further provided that the rights of the parties shall be determined "notwithstanding lapse of time or statutes of limitation," and that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset * * *," and that "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof." § 2.

Pursuant to this statute the present suit was brought to recover money due the Klamath Tribes as just compensation for the taking of the 87,000 acres of their lands, deducting, of course, the $108,750 already received. R. 1-17.

The Court of Claims held the release to be a bar and dismissed the suit. Opin., R. 33, 36-37, 41.

Specification of Errors.

The Court of Claims erred

1. In holding the claim sued upon to be not within the jurisdictional act.

2. In holding the alleged release to be a bar.

3. In construing and applying the jurisdictional act in respect of items of set-off claimed by the United States on account of expenditures as follows: for administration, enforcement of the laws and police, including agency buildings, incidental agency expenses, and pay of Indian agents, interpreters, judges of the Indian courts, and miscellaneous employees, and pay and equipment of Indian police; for erection and repair of a sawmill; for Indian school and agency buildings; for transportation by carrier; and for education of children of the Tribes at schools off the Reservation.

Summary of Argument.

I. The jurisdictional act, in authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath etc. Indians • • • may have against the United States, • • • for the failure of the United States to pay said Indians any money or other property due," § 1, with the *one* exception of claims "which have not heretofore been determined by the Court of Claims," § 1, and in further providing that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," § 2, removed the bar of the alleged release and opened the way for the determination of the present claim on the merits.

This construction is confirmed by the legislative history. Any other construction would render meaningless the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel."

II. In any event the alleged release was never binding upon the Klamath Tribes.

First, authority to bind an Indian tribe in the disposition of tribal property is vested in the body of the members in general council assembled. This release was not author-

ized, approved or ratified at any general council of the Klamath Tribes. Second, the members of the Tribes who signed it as individuals did so under duress. Finally, the plain inadequacy of the consideration for the release, taken in connection with the unequal positions of the parties, was enough without more to invalidate it.

III. As the taking of the Indians' property in the 87,000 acres was done under authority of an act of Congress, they are entitled to just compensation as for a taking under the power of eminent domain, i. e., the value of their property at the date of the taking plus interest from that date to the date of payment.

The provision of § 3 of the jurisdictional act limiting the damages for the appropriation of Indian land "to the value of the said land at the time of said appropriation," is by its own terms applicable only to land "wrongfully appropriated." Land taken under authority of an act of Congress in the exercise of a constitutional power is not *wrongfully* appropriated. Besides, even if the meaning of the provision were doubtful it should be construed so as not to violate a constitutional right.

IV. Expenditures by the United States in fulfillment of treaty obligations, and expenditures not made "for the benefit of said Indians or any band thereof," are not chargeable against the Indians under the jurisdictional act. The Court of Claims allowed the United States set-offs not authorized by the jurisdictional act, namely, expenditures for administration, enforcement of the law and police, for Indian school and agency buildings, for erection and repair of a sawmill, and for transportation by carrier,—all expenditures made in fulfillment of treaty obligations; also, expenditures for education of selected children of the Tribes at schools off the Reservation, which were not "for the benefit of said Indians or any band thereof" within the meaning of the jurisdictional act.

The Argument.

Point I.

The jurisdictional act removes the bar of the alleged release and reopens the claim for determination on the merits.

1. The jurisdictional act submits to the Court of Claims "all claims of whatsoever nature which the Klamath Indians * * * may have against the United States, *which have not heretofore been determined by the Court of Claims,* * * * for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due," § 1, with power "to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon," § 1, "notwithstanding lapse of time or statutes of limitation, *and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel,* but may be pleaded as an offset * * *," § 2. [Italics ours.]

Thus, with the one exception of claims heretofore determined by the Court of Claims, the act covers "all legal and equitable claims, if any, of said Indians, against the United States," and in making that specific exception Congress itself has recognized that the description of the claims authorized to be submitted was so comprehensive as to admit of no exception unless expressly made.

If Congress had intended to except claims heretofore settled or purported to have been settled by agreement between the parties as well as by determination of the Court of Claims it must be presumed that it would have been equally explicit in saying so.

It is indeed a "well known maxim," as stated by Mr. Justice Story in *Bend* v. *Hoyt*, 13 Pet. 263, 271-272, 10 L. ed. 154, 158, "that an exception in a statute amounts to an affirmation of the application of its provision to all other cases not excepted."

2. In addition, the jurisdictional act expressly provides that—

> "*any* payment which may have been made upon any claim so submitted *shall not be pleaded as an estoppel*, but may be pleaded as an off-set • • •." § 2 [Italics ours.]

Unless this clause shall be construed as applicable to a payment made and accepted at the time as payment in full it would mean nothing, since, of course, in no event would acceptance of a partial payment operate as an estoppel.

The reasoning of the Court below as to the effect of this clause, R. 35-36, is hard to follow.

On the one hand it concedes that the clause "is not meaningless," R. 35, that it has "some remedial purpose," R. 35; but the conclusion reached is that the clause does not "preclude the United States from proving that a payment made discharged the liability," R. 36, that it "did [does] not refer to a settlement, • • • but to an outstanding claim," R. 36.

If the clause does not apply to a payment in settlement or discharge of a claim, in other words, if it applies only to payments on account, then it *is* meaningless, because, of course, it would have been unnecessary to provide that acceptance of a payment on account should not operate as an estoppel.

In another place the Court undertakes to answer the argument that the clause would be meaningless unless applicable to a payment on a claim made and accepted in discharge of all liability by attempting to draw a distinction

between such a payment when accompanied by a formal release and when not, implying that the clause would apply in the latter case but not in the former. R. 36.

There is nothing in the language of the clause which purports to make its operation depend upon any such distinction. Besides, no such distinction exists. Let it once be established by competent evidence of any kind that a payment upon a claim was made and accepted in full settlement and the payment operates as a discharge just as much as if a formal release had been executed. It is a question of intention, not method of proof. *Dodge* v. *Freedman's Savings & Trust Co.*, 93 U. S. 379, 387, 23 L. ed. 920, 923; *Luckenbach* v. *McCahan Sugar Ref. Co.*, 248 U. S. 139, 149, 63 L. ed. 170, 176.

The opinion below also observes that, "A settlement and release of a claim is something different in law from a 'payment upon a claim.'" R. 36. But that, as just shown, depends upon the intention of the parties, i. e., whether the payment was made and accepted as a payment in full.

3. The jurisdictional act contains further evidence within itself of the purpose of Congress to reopen all claims of the Klamath Indians for determination on the merits. That is, it provides that "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians," and it waives defenses based on "lapse of time or statutes of limitation." § 2.

Except in return for a reopening of the claims of these Indians for adjudication on the merits, it is unthinkable that Congress would have taken back everything the United States had ever given them at any time as a condition of allowing them to sue the United States to recover money the United States owed them.

In other words, the evident purpose—putting out of view claims already adjudicated by the Court of Claims—was to

arrive at a just settlement *de novo*, forestalling all pleas in bar based on estoppel or limitations on the one side or on the irrevocability of absolute gifts on the other.

4. If the language of the jurisdictional act had left the matter in any doubt, which, as we think, it does not, the doubt would be removed by the Reports of the Committees on Indian Affairs of the House of Representatives and the Senate recommending the passage of the act. H. Rep. No. 672, 66th Cong., 2nd sess.; S. Rep. No. 548, 66th Cong., 2nd sess.

While the act is not limited to any specific claim or claims, in pressing for its passage the spokesmen for the Indians concentrated upon a long-standing claim growing out of a boundary controversy. *Ibid.*

In an act approved June 10, 1896, c. 398, 29 Stat. 321, 342, Congress had taken cognizance of a claim of the Klamath Indians that by an erroneous survey they had been deprived of lands within the boundaries of their Reservation as defined in the Treaty of October 14, 1864, 16 Stat. 707, and authorized the President to appoint a commission to determine the correct location of the boundaries acording to the terms of the Treaty. Later in the same year, 1896, the Commission made a report determining the boundaries of the Reservation in accordance with the terms of the Treaty, and finding that a large area had been excluded from the Reservation by an erroneous survey of the boundaries in 1871. H. Rep. No. 672, 66th Cong., 2nd sess., p. 7.

Thereafter, under authority of an act of Congress approved July 1, 1898, c. 545, 30 Stat. 571, 592, the Secretary of the Interior concluded an agreement with the Indians dated June 17, 1901, subject to ratification by Congress, in which the Indians ceded to the United States the land found to have been excluded from the Reservation by the errone-

ous survey, 621,824 acres, Art. I, H. Rep. No. 672, 66th Cong., 2nd sess., pp. 8, 19, and the United States, in consideration therefor, agreed to pay them $537,007.20, "*in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in* 1871," Art. II, Ibid., pp. 19-20. [Italics ours.]

This agreement was set forth and ratified in an act of Congress approved June 21, 1906, c. 3504, 34 Stat. 325, 367-368, and the sum of $537,007.20 was appropriated to be paid the Indians in accordance with its terms, 34 Stat. 368.

Here then was an agreement between the Klamath Indians and the United States, entered into with all the formalities of a treaty, in full settlement of all claims growing out of the boundary dispute.

Now, as before stated, these were the claims most urged when the jurisdictional act was under consideration, and chief among the claims set forth in the Report of the House Committee on Indian Affairs as the occasion for recommending passage of the act, H. Rep. No. 672, 66th Cong., 2nd sess., pp. 7-15, *and the Committee not only knew of the settlement agreement of June* 17, 1901, *but copied it in full in its Report, Ibid.,* pp. 8, 13, 19. The bill having passed the House, it was reported favorably by the Senate Committeee on Indian Affairs, with a reference to the Report of the House Committee, S. Rep. No. 548, 66th Cong., 2nd sess., so that the Senate Committee also had knowledge of the settlement.

So, we repeat, if the language of the jurisdictional act had left the matter in any doubt, the legislative history makes it clear beyond question that Congress intended the act to include claims which had been the subject of prior settlement agreements between the Indians and the United States as well as unsettled claims.

It was suggested in the Government's brief in opposition to the petition for certiorari that all that the legislative history shows is that Congress intended to permit the settlement agreement of 1901 to be *construed*, not reopened. But as the agreement expressly provided that the payment made was "in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in 1871," it is clear that the Court must go behind the settlement, and not merely construe it, in order to adjudicate the boundary claim.

5. In *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. ed. 306, the Act of Congress of March 3, 1881, under which the suit was brought, authorized the Court of Claims "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon," with power "to review the entire question of differences *de novo*." 119 U. S. 2, 30 L. ed. 306. One group of claims asserted in the suit was for failure of the United States fully to perform its obligations under Article 14 of the Treaty of 1830. 119 U. S. 5, 30 L. ed. 307. However, the Choctaws had previously received from the United States a payment of $872,000 in respect of these claims, and had executed, as the Act of Congress appropriating the money required, "a final release" of such claims, and the United States, just as in the present case, pleaded this release in bar on the theory that only *unsettled* claims came within the jurisdictional act. 119 U. S. 14-15, 26, 43-44, 30 L. ed. 310-311, 314, 320. As in the present case, the Court of Claims sustained the plea, 21 Ct. Cl. 59, 71, 101-104, but this Court reversed the decision, saying:

> "Under the terms of the Act of March 3, 1881, in exercising the jurisdiction thereby conferred, the Court

> of Claims is empowered to review the entire question of differences *de novo*, which may be interpreted to imply that the whole matter was opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of the statutes referred to." 119 U. S. 29, 30 L. ed. 315.

The jurisdictional act in the present case is equally broad. Power to hear and determine "all claims of whatsoever nature * * * for the failure of the United States to pay said Indians any money or other property due," coupled with a waiver of the defenses of estoppel and limitations, *ante*, 9, is the equivalent of power "to review the entire question of differences *de novo*."

In *Iowa Tribe of Indians* v. *United States*, 68 Ct. Cl. 585, the jurisdictional act authorized to be submitted thereunder "the claims of the Iowa Tribe of Indians, of Oklahoma, against the United States," for adjudication of "the amount, if any, which may be legally or equitably due said tribe * * * under any stipulations or agreements, whether written or oral, * * * or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians." Pp. 602, 603.

These Indians, by an agreement in writing, ratified by Act of Congress, had "surrender[ed] and relinquish[ed] to the United States all their right, title, claim and interest in and to and over" certain lands for specified considerations. P. 589. Subsequently they asserted a right to additional compensation on the ground that the written agreement did not express the actual agreement as understood by them. Notwithstanding their prior relinquishment of all claims to the lands this claim was held to come within the jurisdictional act. Citing the *Choctaw Nation Case*, the Court of Claims observed that in that case—

"the Supreme Court, speaking of a special *jurisdictional act similar in its scope to the present one,* held that the act operated to reopen in its entirety the claims of the Choctaws growing out of a series of treaties as well as an award made by the Senate." P. 607. [Italics ours.]

The jurisdictional act in the case of the Iowa Tribe of Indians is at least no broader than that in the present case, so that if the former is "similar in its scope" to the jurisdictional act in the *Choctaw Nation Case* the same must be true of the latter. Indeed, the provision in the jurisdictional act in the case of the Iowa Tribe of Indians which the Court of Claims singled out as especially comprehensive, namely, that conferring jurisdiction to adjudicate claims "for the failure of the United States to pay any money which may be legally and equitably due said tribe of Indians," p. 606, is found almost word for word in the jurisdictional act in the present case, § 1.

In *Fort Berthold Indians* v. *United States,* 71 Ct. Cl. 308, 337, the Court of Claims again took cognizance, under a jurisdictional act practically identical with that in the present case, of a claim which had been previously settled.

6. In *Creek Nation* v. *United States,* 63 Ct. Cl. 270, cited in the Court below, the jurisdictional act was limited to claims "arising under or growing out of any treaty or agreement," 63 Ct. Cl. 270, and the ground of the decision was that a claim which had been settled by an agreement was not a claim *arising under or growing out of an agreement.* 63 Ct. Cl. 272-273, 274.

Likewise in *United States* v. *Old Settlers,* 148 U. S. 427, 37 L. ed. 509, cited by the Court below as inhibiting it "from adjudicating any Indian claims depending for their validity upon the setting aside or abrogation of any article of a

treaty," the jurisdictional act was limited to claims "arising from or growing out of treaty stipulations and acts of Congress relating thereto," 148 U. S. 428, 37 L. ed. 510, and all that was decided was that a claim which could only be asserted by *disregarding* a treaty could not be said to be a claim *arising under or growing out of* a treaty. 148 U. S. 469, 37 L. ed. 524-525. Furthermore, the jurisdictional act there did not waive the defense of estoppel. In *Sisseton and Wahpeton Bands of Sioux Indians* v. *United States*, 277 U. S. 424, 72 L. ed. 939, also, the jurisdictional act was limited to claims "under any treaties or laws of Congress," and there was no provision waiving the defense of estoppel.

Here, on the other hand, the jurisdictional act extends to "all claims of whatsoever nature which the Klamath etc. Indians • • • may have against the United States," not only *under* any treaty or agreement or act of Congress, but "for failure of the United States to pay said Indians any money or other property due," excepting only claims heretofore determined by the Court of Claims. The difference was pointed out by the Court of Claims itself in *Iowa Tribe of Indians* v. *United States*, 68 Ct. Cl. 585, 606.

To say that no money was due on the present claim because the Indians had accepted the $108,750 in full payment and given a release is to ignore again the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel." If we are right that by virtue of that provision acceptance of the $108,750 by the Indians in full payment cannot be set up against them as an estoppel, *ante*, 9, the difference between what was just compensation under the Constitution for the 87,000 acres and the $108,750 already paid is just as much money due the Indians as if the release had never been given.

7. It is unavailing to argue, as the Government did below and in its brief in this Court in opposition to the petition for certiorari, that there are fifteen other similar acts of Congress and that to give them the effect claimed for this one would reopen many settlements between the Indian tribes and the United States.

For the choice between perpetuating an unconscionable settlement with an Indian tribe and suffering the inconvenience of reopening a claim for determination on the merits is one for Congress to make in each case as it arises, and in the present case, as shown above, Congress has left no room for doubt as to its intention.

Besides, there is nothing before the Court to show what settlements with other tribes might be affected by construing the jurisdictional act in the present case as reopening claims of the Klamath Indians for determination on the merits; nor to what extent the reopening of settlements with other tribes might be limited by the language of the particular jurisdictional act. Thus, of the fifteen other jurisdictional acts referred to by the Government ten, listed below,[1] are limited to claims *arising under or growing out of* any treaty or agreement or act of Congress, as in the case of *Creek Nation* v. *United States*, 63 Ct. Cl. 270, *ante*, 15.

Certainly there is no substance in the suggestion that the construction we are contending for would mean the reopening of all treaties or agreements under which payments of money have been made to the several tribes named in these

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[1] Acts of March 19, 1924, c. 70, 43 Stat. 27; May 20, 1924, c. 162, 43 Stat. 133; May 24, 1924, c. 181, 43 Stat. 139; June 7, 1924, c. 300, 43 Stat. 537; June 7, 1924, c. 335, 43 Stat. 644; March 3, 1925, c. 459, 43 Stat. 1133; July 2, 1926, c. 724, 44 Stat. 801; July 3, 1926, c. 734, 44 Stat. 807; March 2, 1927, c. 250, 44 Stat. 1263; March 3, 1927, c. 302, 44 Stat. 1349.

jurisdictional acts, including treaties or agreements for the cession of lands. The language of the statute is "any payment • • • upon any *claim* • • • shall not be pleaded as an estoppel." A claim arises only when violation of a right is asserted. Payment of the agreed price for a voluntary cession of lands or rights is not, in the nature of things, a payment upon a *claim*.

Point II.

In any event the alleged release was never binding upon the Klamath Tribes, first, because not the act of the Tribes; second, because signed under duress; and third, because the plain inadequacy of the consideration taken in connection with the unequal positions of the parties was enough without more to invalidate it.

First. The alleged release was not the act of the Klamath Tribes and therefore was ineffectual to surrender any rights or claims of the tribes.

1. As regards *tribal* rights of property, an Indian tribe is not bound, of course, by the acts of individual members holding no authority to represent the tribe. Authority to bind the tribe in such matters is vested in the members in *general council assembled. Choctaw Nation* v. *United States*, 119 U. S. 1, 18-19, 30 L. ed. 306, 312; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 317-318, 319-320, 71 L. ed. 658, 659, 660.

In the case last cited this Court decided that a deed to lands belonging to an Indian village executed by the captain of the village for himself and inhabitants of the village was void because its execution had not been authorized by the Indians "in council." 273 U. S. 317-318, 319-320, 71 L. ed. 659, 660. There is no essential difference between the juridical status and characteristics of an Indian pueblo or village and an Indian tribe. *United States* v.

Chavez, 290 U. S. 357, 361, 78 L. ed. 360, 362; *United States* v. *Candelaria*, 271 U. S. 432, 439-440, 70 L. ed. 1023, 1025-1026; *United States* v. *Sandoval*, 231 U. S. 28, 58 L. ed. 107.

The acts of Congress also recognize the general council as the proper authority to bind an Indian tribe in the disposition of tribal property. As stated in the opinion below:

> "The United States in negotiating treaties assembled councils, and the statutes of the United States disclose repeated acts of Congress referred for ratification to Indian councils. In later times the Indian council has developed into more settled and established forms of procedure, and the United States, in the matter of legislation affecting Indian lands and funds, has proceeded largely upon the rule of obtaining the assent of the Indians to the legislation enacted." R. 39.

The Klamath Indians were no exception:

> "The Indians on the Klamath Reservation met in councils. They were called together in some instances upon their own motion, and upon other occasions by the superintendent of the agency." R. 39.

As an example, the Act of March 4, 1933, c. 275, § 1, 47 Stat. 1568, relating to the modification of contracts for the sale of timber on Indian lands, requires "the consent of the Indians involved, expressed through a regularly called general council," and in particular it provides as to the Klamath Indians that "no contract of sale of Indian timber on the Klamath Indian Reservation in Oregon shall be entered into without the consent of the said general council."

So, also, administrative practice recognizes the general council as the source of authority in such matters, as shown by the instructions of the Commissioner of Indian Affairs to the Superintendent of the Klamath Reservation to call a general council to pass upon the transaction in the pres-

ent case,[1] and by the calling of such a council by the Superintendent "to assemble at the general agency headquarters on December 5, 1908, for the purpose of considering compliance with the Act of April 30, 1908," Finding XV, R. 26.

The Act of April 30, 1908, appropriating $108,750 to be paid the Tribes of the Klamath Reservation in settlement of their claims growing out of the taking of the 87,000-acre tract did not authorize any departure from this method of binding an Indian tribe in the disposition of tribal property. On the contrary it expressly provided for a release "through the usual channels," 35 Stat. 92.

That the Commissioner of Indian Affairs understood this to mean a release assented to by the Indians in general council and not individually is shown not only by his beforementioned instructions to call a general council but by the form of release supplied by his office, which provided, "Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation *in council assembled;* do hereby relinquish etc., etc." Findings XIV, XVIII, R. 25, 27. [Italics ours.]

As the law does not define a general council it must be assumed that the references to a general council in the decisions of the Courts and acts of Congress and administrative practice mean a general council organized and conducted in accordance with established tribal custom.

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[1] Letter dated September 8, 1908, Exhibit 84, reply of Department of Interior to plaintiffs' call: "• • • the office has always required such instruments to be executed by a majority of the tribe. • • • You will therefore call the Indians in general council, at such time as may be most convenient, and have them execute the release as directed in Office Letter of July 14, 1908." This letter was not incorporated in the findings but there is no dispute as to its authenticity.

2. The release here was *not* assented to by the Klamath Tribes in council assembled.

All that the findings of fact show is that the members of the Tribes were notified to assemble at the agency headquarters on December 5, 1908, for the purpose of holding a general council to consider acceptance of the provisions of the Act of April 30, 1908, Finding XV, R. 25-26; that "200 or more" Indians responded and the Superintendent of the Reservation explained the matter, Finding XVI, R. 26; that some opposition developed but in the end the release was signed by "100 or more" of the Indians present, Finding XVI, R. 26; that additional signatures were obtained at a subsequent meeting in another part of the Reservation of Indians who seldom attended general councils at the agency headquarters, Finding XVII, R. 26; and that the release was signed by 150 adult male[1] members of the Tribes, in all, Finding XVII, R. 26, out of a total adult membership of 640—287 men and 353 women, Finding XV, R. 25.

The 150 did not all sign, however, at these two meetings. Nor is it so stated in the findings. Fearing that such might be inferred from the context, the petitioners requested a clarification of the findings on this point, citing the testimony of the Superintendent himself that some signed at

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[1] The finding that, "The adult males were alone allowed to vote in Indian councils," Finding XV, Rec. 25-26, we challenge as a matter of law, because without any supporting evidence. See *Hathaway & Co.* v. *United States*, 249 U. S. 460, 463, 63 L. ed. 707, 708; *William Cramp & Sons* v. *United States*, 239 U. S. 221, 232, 60 L. ed. 238, 243; *United States* v. *Clark*, 96 U. S. 37, 24 L. ed. 696. However, assuming it to be true, a majority of the adult male members of the Tribes of the Klamath Reservation never voted in favor of the alleged release at any general council of the Tribes, as will appear.

other times and places. To this the respondent replied that "the Court did *not* find that the 150 signatures were obtained at the two meetings."[1] [Italics ours.]

The parties being in agreement as to the meaning and effect of the findings on this point, the wording was not changed.

Thus, of the 150, an unknown number signed at other times and places. As the total adult male membership was 287, it follows that the findings do not show that the release was signed at the two meetings by a majority of the adult male members, much less by a majority of all the adult members.

Nor do the findings show how a general council of an Indian tribe is organized and its proceedings conducted, and necessarily therefore they do not show whether these meetings either in method of organization or method of procedure met the requirements of a general council.

Nor do they show any vote of the meetings on the proposed release.

The petitioners asked the Court below to find, in accordance with the uncontradicted evidence, oral and documentary, that a general council of the Tribes of the Klamath Reservation is a meeting, pursuant to call, of the members of the Tribes, who thereupon organize by electing from their own number a chairman and a secretary; that questions are submitted and votes taken and minutes of the proceedings kept; that at the meetings here in question no chairman was elected, and no secretary; that there was opposition to the proposal to accept the $108,750 in settlement of the claims growing out of the taking of the 87,000-acre tract and no vote was taken on that proposal or on any other matter;

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[1] Defendant's Objections to Plaintiffs' Motion for New Trial and to Amend the Special Findings of Fact and to Make Additional Ones, p. 5.

and that no minutes of the proceedings were taken down or kept. They also requested to have incorporated in the findings the minutes of the proceedings of several prior general councils of the Klamath Indians, produced from the records of the Department of the Interior, to show exactly how a general council of the Klamath Indians is organized and conducted.

The defendant objected to these requests on the ground of immateriality, and the Court denied them, saying:

> "The failure to observe the details of procedure previously followed by the Indians in conducting a council is not fatal." R. 40.

But electing their own presiding officer by the members of a tribe assembled to hold a general council, and debating and taking votes in the presence of each other, with a secretary to record the votes and proceedings, are not mere details of procedure. They are the means of assuring a free and accurate expression of the tribal will. They are what make a general council. Not *every* meeting of the members of a tribe is a general council.

While lack of findings on these points restricts the argument on this branch of the case it does not seem necessary to ask that the case be remanded for additional findings.

For the burden of establishing the validity of a release of a claim by dependent persons like seamen or Indians rests on the party relying upon it—in this case the Government. *Brown* v. *Lull,* Case No. 2018, 4 Fed. Cas. 407, 409-410, Story, J.; *Harden* v. *Gordon,* Case No. 6047, 11 Fed. Cas. 480, 485, Story, J.; *Harmon* v. *United States,* 59 F. 2d 372, 373, C. C. A. 5th.

Therefore, since the assent of the Klamath Tribes expressed in a general council organized and conducted in accordance with established practice was essential to the validity of the release in the present case, *ante,* 18-20, and

since the findings do not show such assent, the release must fail as a defense.

But waiving the point that the findings do not show that either of the two meetings was organized as a general council of the Klamath Tribes, and assuming that the established methods of conducting the business of a general council may be dispensed with so long as the will of a majority is indicated in *some* manner, as, for example, by signing a paper; in short, assuming that signing the release at either of the meetings was the equivalent of voting for it in general council, and assuming further, as claimed by the Government, that a majority of the adult *male* members of a tribe can bind it in general council, the release in question must still fail as a defense because, as pointed out above, *ante*, 21, the findings do not show that it was signed at either of the meetings or at the two together by a majority of the adult male members of the Klamath Tribes. And, as before stated, one pleading a release of a claim by a dependent person like an Indian has the burden of establishing its validity. *Ante*, 23.

The release must also fail as a defense even though the Government should argue, contrary to the position of the Indian Office, *ante*, 20, that the requirements would be met if the release were signed at the two meetings together by a majority of the Indians *present* and qualified to vote, regardless of whether they constituted a majority of the entire voting membership, because the findings do not show how many were present or how many signed at each meeting.[1]

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[1] This is not the fault of the findings. Neither meeting having been organized or conducted in the manner required of a general council, and no record of the proceedings having been made, it is impossible now to ascertain how many Indians were present or how many signed the release at the meetings.

It follows that the release pleaded in bar was not the act of the Klamath Tribes and hence was ineffectual to surrender tribal property rights.

3. Confronted with the fact that in no possible view of the case can it be maintained that a majority of the Indians of the Klamath Reservation, or even a majority of the adult males, assented to the release in general council, the Assistant Attorney General contended below that no action by the members in general council was necessary in order to make the release binding upon the Tribes.[1]

It has been shown, however, that all branches of the Government recognize the general council as the source of authority to bind an Indian tribe in the disposition of tribal property. *Ante*, 18-20. And the draft of release transmitted by the Indian Office by its terms provided for execution by "a majority of the Indians of the Klamath Reservation *in council assembled.*" *Ante*, 20. [Italics ours.]

As further ground for its contention that the alleged release was binding upon the Klamath Tribes although neither authorized nor ratified by them in general council, the Government cited the acceptance of the release by the Secretary of the Interior as a "sufficient" compliance with the provisions of the Act of April 30, 1908, Finding XIX,

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[1] "The action of a general council on the question of accepting or rejecting the offer of Congress would have availed nothing, because the department held that the release should be signed by a majority of the tribe (R., p. 837). No action of a general council could have satisfied this requirement." Supp. Br., 889.

"Plaintiffs contend that the general council was not organized, that there was no chairman, no secretary, no minutes, and no vote. But since the action of a general council could not effect a release, such formalities were useless." *Ibid.*, 897.

R. 27, and an agreement dated June 17, 1901 (heretofore referred to in another connection), for the cession of certain lands by the Klamath Tribes to the United States, which was executed on the part of the Indians by a majority of the adult males, and which it was said indicated what Congress meant by a release executed "through the usual channels." Government's brief below, pp. 788-790.

If the release was not in law the act of the Klamath Tribes the approval of the Secretary of the Interior could not make it such. Besides, the Secretary's approval was based, it must be assumed, upon the recital in the release that it was signed by "a majority of the Indians of the Klamath Reservation in council assembled," Finding XVIII, R. 27. This statement was incorrect. As shown above, the release was *not* signed by a majority of the Indians nor even by a majority of the male adult Indians of the Klamath Reservation *in council assembled*. *Ante*, 21.

As to the agreement of June 17, 1901[1], before its execution the terms of the agreement, including a provision for its execution on the part of the Indians by a majority of the adult male members, were approved by vote of the Tribes *in council assembled*. H. Doc. No. 156, 56th Cong., 2nd sess., pp. 28-29, 31; H. Doc. No. 79, 57th Cong., 1st sess., p. 1[2]. As a precedent, therefore, this agreement refutes rather than confirms the Government's contention, which

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[1]This agreement was first executed October 29th, 1900. It was revised in a minor particular and re-executed June 17th, 1901. H. Doc. No. 79, 57th Cong., 1st sess., p. 1.

[2]"* * * I assembled the Indians in council on Monday, the 22d instant, at which council there were about 150 Indians, and commenced negotiations for the relinquishment by them of said excluded area, including all claims and demands of said Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in 1871. * * *

overlooks the distinction between the authorization or approval of an act or agreement by a body corporate or politic and the method of execution.

SECOND. THE ALLEGED RELEASE IS INVALID BECAUSE SIGNED UNDER DURESS.

The opinion of the Court of Claims states that some fifty Indian witnesses testified without exception that the Superintendent of the Reservation stated to the Indians in substance "that if they did not accept the $108,750 and execute the release in question, they would lose both the land and money—they would get nothing." R. 39.

The Superintendent did not deny making substantially that statement, but testified that "it was not given in the manner of a threat or anything of that sort, just simply to explain to them that if they wanted that money that they must sign." R., Ct. Cl., 665-666.

The petitioners requested the Court below to find that this statement was made, but the request was ignored.

"* * * I was prepared to conduct negotiations with them in open council, or, what I regarded the better plan, with a committee of three or five members of the tribes, appointed by the Indians assembled, to conduct the negotiations, and after we had reached an agreement we would report it to the full council for its action; * * * In about half an hour they notified me that they had appointed a committee of five persons and were ready to proceed with the negotiations. * * *

"The committee took up only one question at a time and after disposing of it reported to their full council for further instructions. * * * after I had reached an agreement with the committee it was reduced to writing and explained to the Indians assembled, who unanimously concurred in its provisions." Report of United States Indian Inspector McLaughlin, H. Doc. No. 156, 56th Cong., 2nd sess., pp. 28-29.

Whether intended by the Superintendent as a threat or not, the petitioners were entitled to a finding that the statement was made so as to be able to contend as a matter of law that the mere making of it, particularly considering the dependent position of those to whom it was made, constituted duress.

There being no question that the statement was made, it is hoped that if this Court shall deem the statement material the respondent will consent to have the fact that it was made treated as a part of the record for the purposes of the case in this Court, as was done under similar circumstances in *Ceballos* v. *United States*, 214 U. S. 47, 49-50, 53 L. ed. 904, 905, without the necessity of sending the case back for a finding on the subject.

Duress as a legal ground for avoidance of a contract or settlement is a threat which, if carried out, would probably cause injury to person or property for which the remedy afforded by the courts is inadequate. *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 48-49, 70 L. ed. 822, 827; *Hazelhurst Oil Mill Co.* v. *United States*, 70 Ct. Cl. 334, 352-355. And the United States no less than private parties is subject to the doctrine. *Ibid.*

In *Hartsville Oil Mill* v. *United States*, a settlement of claims against the United States under an existing contract was procured by threats to break the contract if the proffered settlement was not accepted. This Court held that—

> "a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate." 271 U. S. 49, 70 L. ed. 827.

In *Hazelhurst Oil Mill Co.* v. *United States*, involving a similar settlement induced by a similar threat, evidence

of "probable consequences for which the remedy afforded by the courts is [was] inadequate" was supplied, and accordingly it was held that the settlement was void for duress. 70 Ct. Cl. 351, 352.

If a threat by officers of the Government to break a contract, coupled with a showing of damage if the threat were carried out, for which the remedy afforded by the courts would be inadequate, be duress, for greater reason must it be duress to state to members of an Indian tribe whose property has already been taken from them, and who at the time had no remedy at all in the courts, that if they do not accept in settlement the amount offered they will get nothing.[1]

It follows that the alleged release was signed under duress and therefore is void.

THIRD. THE PLAIN INADEQUACY OF THE CONSIDERATION TAKEN IN CONNECTION WITH THE UNEQUAL POSITIONS OF THE PARTIES WAS ENOUGH WITHOUT MORE TO INVALIDATE THE RELEASE.

For releasing their claim for just compensation for land worth under the title possessed by them $2,980,000 at the time of the taking, the Indians were paid $108,750! Findings XI, XII, XIX, R. 24, 27. So there can be no question as to the inadequacy of the consideration.

Nor can there be any as to the inequality of the positions of the parties. The Indians are "weak and defenseless people who are the wards of the Nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S.

[1] It would be a different case if the Superintendent had told the Indians that if they did not sign they would not get any money *at that time* but would have to await further action by Congress. And that was all he need have said in the performance of his duty in the matter.

363, 367, 74 L. ed. 478, 481; *Choate* v. *Pratt*, 224 U. S. 665, 675, 56 L. ed. 941, 946; *Jones* v. *Meehan*, 175 U. S. 1; 11, 44 L. ed. 49, 54; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27-28, 30 L. ed. 306, 315; *United States* v. *Kagama*, 118 U. S. 375, 382, 384, 30 L. ed. 228, 230, 231; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31.

In *Choctaw Nation* v. *United States*, this Court referred to the unequal position of the Indians as follows:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." 119 U. S. 28, 30 L. ed. 315.

Where a claim is released for a plainly inadequate consideration by a party occupying a position of inequality the release is void, or, what comes to the same thing, it cannot be pleaded to prevent a determination of the claim on the merits. *Wheeler* v. *Smith, et al.*, 9 How. 55, 13 L. ed. 44; *Thorn Wire Hedge Co.* v. *Washburn & Moen Mfg. Co.*, 159 U. S. 423, 40 L. ed. 205.

This rule applies as much to the United States when relying upon a release as to a private litigant, for "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in

that behalf." *United States* v. *Bostwick*, 94 U. S. 53, 66, 24 L. ed. 65, 66. Compare the cases, *ante*, —, holding that the United States in its contractual relations is subject to the rule as to duress. In addition, the jurisdictional act in the present case is similar to that in the case of the Mille Lac Band of Chippewa Indians, which, it was held (while making no admission of liability), "provides • • • for the adjudication of the claim according to *applicable legal principles.*" *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 500, 57 L. ed. 1299, 1302. [Italics ours.]

In *Wheeler* v. *Smith, et al., ante*, the case was this: Property which had been devised in trust for public purposes was claimed by the nephew and heir at law of the testator on the ground that the devise was invalid. The executors, who were men of high character in whom the claimant reposed confidence, represented that they had been advised by counsel that the devise was valid. A settlement was arrived at under which $25,000 was paid for a release of the claim. Subsequently the heir brought suit, reasserting his claim to the property and praying that the release be set aside because of his inexperience and lack of information as compared with the executors and because of the trust he reposed in them and his need for money at the time. This Court held the release to be void, saying:

> "The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. • • •
>
> "But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. • • •

> "• • • The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights." 9 How. 82, 13 L. ed. 55-56.

That the influences which induced the complainant to sacrifice his interests without a proper understanding of his rights were the result of the unequal positions of the parties and not of any wrongdoing on the part of the executors is made plain by the Court:

> "From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria." 9 How. 82, 13 L. ed. 55.

In *Thorn Wire Hedge Co.* v. *Washburn & Moen Mfg. Co.*, *ante*, while the rule was not applied because "the parties, • • • stood upon an equal footing," 159 U. S. 443, 40 L. ed. 212, the opinion states:

> "It has often been held that where the party executing the release, by reason of youth or advanced age, was incapacitated to act judiciously, or where the release was executed during the existence of fiduciary relations, calculated to beget unquestioning confidence, courts of equity will grant relief where the consideration was plainly inadequate." 159 U. S. 443, 40 L. ed. 212.

Certainly the average Indian is as much "incapacitated to act judiciously" as a person of immature or advanced age.

A familiar application of the rule is in the case of releases by seamen of claims for wages and for injuries. "Receipts or releases given by seamen, even with all the solemnity of sealed instruments, will have no effect beyond

the actual consideration fairly paid." *The Rajah*, Case No. 11538, 20 Fed. Cas. 193. Also, *Brown* v. *Lull*, Case No. 2018, 4 Fed. Cas. 407, 409, 410; *The David Pratt*, Case No. 3597, 7 Fed. Cas. 23, 24, 25; *Harden* v. *Gordon*, Case No. 6047, 11 Fed. Cas. 480, 485; *The Ringleader*, Case No. 11850, 20 Fed. Cas. 818; *Harmon* v. *United States*, 59 F. 2d 372, 373.

In *Harden* v. *Gordon*, Mr. Justice Story stated the reason for the rule in language applicable as much to Indians as to seamen:

> "• • • Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que* trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage. *If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on the one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.*" 11 Fed. Cas. 485. [Italics ours.]

It follows, regardless of any other ground, that because of the unequal positions of the parties and the grossly inadequate consideration the release in the present case is not a bar to a determination of the claim on the merits.

This proposition imputes no wrong to the Congress in proposing to the Indians a settlement of their claim for $108,750. The presumption must be that both the Congress and the Indians were ignorant of the real value of the 87,000 acres.

Point III.

For their estate in the 87,000 acres of which they were deprived by the conveyance to the California & Oregon Land Company the Klamath Indians are entitled to just compensation as for a taking under the power of eminent domain, namely, the value of their estate at the date of the taking plus interest from that date to the date of payment.

1. The taking in this case was not a wrongful appropriation by an officer or agent of the United States but, as before stated, was duly authorized by act of Congress. *Ante*, 7.

It is now settled that, regardless of whether condemnation proceedings are instituted or not, when property is taken for public use under authority of an act of Congress there arises an implied promise on the part of the United States, enforceable by suit in the Court of Claims or the District Court, to pay the owner the just compensation provided for by the Fifth Amendment, and that in arriving at just compensation when payment is deferred there must be added to the value of the property at the time of the taking interest from that date to the date of payment so as to put the owner where he would have been if payment had been made at the time of the taking. *Seaboard Air*

Line Co. v. *United States,* 261 U. S. 299, 67 L. ed. 664; *Campbell* v. *United States,* 266 U. S. 368, 69 L. ed. 328; *Phelps* v. *United States,* 274 U. S. 341, 71 L. ed, 1083; *International Paper Co.* v. *United States,* 282 U. S. 399, 75 L. ed. 410; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 75 L. ed. 473; *Jacobs* v. *United States,* 290 U. S., 13, 78 L. ed. 142.

It is also settled that this rule applies to the property of an Indian tribe where the tribe has been authorized to sue the United States, as here. *Cherokee Nation* v. *Southern Kansas R. R. Co.,* 135 U. S. 641, 34 L. ed. 295; *United States* v. *Mille Lac Band of Chippewa Indians,* 229 U. S. 498, 57 L. ed. 1299; *Yankton Sioux Tribe of Indians* v. *United States,* 272 U. S. 351, 71 L. ed. 294.

In *Yankton Sioux Tribe of Indians* v. *United States,* the case was as follows: The Indians had ceded to the United States 150,000 acres of land, and the United States in part consideration agreed that upon a certain condition a tract of 648 acres known as the Pipe Stone Reservation should become the property of the Indians in fee simple. Although, as claimed by the Indians, the condition happened, causing the title to the tract to vest in them, officers of the United States, under authority of an act of Congress, took possession of it for another purpose. Thereafter, another act of Congress, c. 222, 41 Stat. 738, similar to the jurisdictional act in the present case, authorized the Indians to bring suit in the Court of Claims to determine what their interest in the tract was and to recover whatever amount was legally or equitably due from the United States.

It was held that ownership of the tract had become vested in the Indians in fee simple and that they were "entitled to just compensation *as for a taking under the power of eminent domain.*" 272 U. S. 359, 71 L. ed. 298. [Italics ours.]

While in that case the property taken was owned by the Indians in fee simple, the decision could not have been different had their interest been a lesser one, since, of course, the right to just compensation as for a taking under the power of eminent domain cannot be made to depend upon the extent of the interest taken.

Indeed, it has been expressly decided that as regards their status under the Constitution there is no difference between Indian tribes which hold their lands under a fee simple title and those which hold under an exclusive right of occupancy. *United States* v. *Sandoval*, 231 U. S. 28, 48, 58 L. ed. 107, 115, and cases there cited.

In *United States* v. *Mille Lac Band of Chippewa Indians*, the Government had contended that certain resolutions of Congress under which rights of the Indians had been taken were passed in the exercise of the plenary power of Congress to govern the Indian tribes and that hence there was no liability for just compensation, citing *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. ed. 183, and *Lone Wolf* v. *Hitchcock*, 187 U. S. 656, 47 L. ed. 306. But this Court held otherwise, saying:

> "• • • The resolutions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115, and *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564, 568, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government." 229 U. S. 509-510, 57 L. ed. 1306.

2. In the Court below the Government did not dispute the proposition that an Indian tribe whose property has been taken for a public use under authority of an act of Con-

gress is entitled to just compensation under the Fifth Amendment as for a taking under the power of eminent domain, but maintained that because the Act of June 21, 1906, authorized the Secretary of the Interior upon taking the 87,000 acres to convey them to a private corporation the taking was for a private and not a public use and therefore not a taking under the power of eminent domain, so that interest as an element of just compensation would not be allowable.

Persons whose property is authorized to be taken by an act of Congress may contest the taking on the ground that it is not for a public use. But it is a novelty to find the United States as a litigant in its own courts contending that where property has been taken by its officers or agents by express direction of an act of Congress the taking was *not* for a public use.

The short answer is that the law officers of the United States will not be heard to make any such contention. They are estopped by the decision of Congress that the taking *was* for a public use, whether expressly declared or implied from the authorization to take.

Compare *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 335, 37 L. ed. 463, 471, holding that where a dam in a river had been built with the approval of Congress, even Congress itself is estopped from ordering the removal of the dam as an obstruction to navigation, although, of course, the dam could be taken under the power of eminent domain,—a ruling approved in *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, 59 L. ed. 939, 946; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82, 89, 57 L. ed. 1083, 1086; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 513, 67 L. ed. 773, 777.

Let it be assumed, however, that the question is open to the same extent as if raised by the person whose property has been taken.

Even in that case the decision of Congress as to what is a public use, whether expressly declared or implied from the authorization to take, "is entitled to deference until it is shown to involve an impossibility." *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66, 70 L. ed. 162, 165; also *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680, 40 L. ed. 576, 581.

There is, of course, no rigid test that can be applied in such cases. Any use necessary or appropriate in the execution of the powers granted Congress by the Constitution is a public use. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 679, 40 L. ed. 576, 580.

Use by the general public is not the test. *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32, 60 L. ed. 507, 511; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531, 50 L. ed. 581, 583.

Nor is the taking any less a taking for a public use because, as the Government argued below, the property taken is at once transferred to private persons or corporations, so long as the purpose to be accomplished is within the scope of the legislative power. *Internat. Paper Co.* v. *United States*, 282 U. S. 399, 408, 75 L. ed. 410, 414.

Furthermore, as Congress has the most extensive powers under the Constitution to legislate for the government of the Indian tribes and the regulation of their affairs, its discretion in exercising the power of eminent domain is at its widest in that field. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 656-657, 34 L. ed. 295, 302.

Applying these principles to the present case, 111,385 acres of land within the admitted boundaries of the Klamath Reservation had been conveyed away by patents issuing from the Department of the Interior as the result of mistake or fraud, and suits by the United States to recover this tract had been unsuccessful. *Ante*, 3. These were

lands which in part had been allotted to members of the Klamath Tribes in severalty and on which they were living, *ante*, 3, and, as reported to Congress by the Secretary of the Interior, they "complained bitterly," *ante*, 3.

It seems too plain for argument that procuring the return of these lands and removing this cause of bitterness in the relations between the Indians of the Klamath Reservation and the United States was not only an object within the scope of the powers of Congress in respect of the Indian tribes and their relations with the United States but was the positive duty of Congress as the guardian of its Indian wards.

This being so it follows that the taking of the 87,000 acres from another part of the reservation, unallotted, to be given in exchange for the 111,385-acre tract, was for a public use.

3. Nor was the taking any the less a taking under the power of eminent domain because the act of Congress did not in terms make provision for just compensation.

Immediately upon a taking of private property for a public use under authority of an act of Congress an implied promise to pay just compensation arises. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, 28 L. ed. 846, 850; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. ed. 539, 546-547; *United States* v. *Cress*, 243 U. S. 316, 329, 61 L. ed. 746, 753; *Bothwell* v. *United States*, 254 U. S. 231, 233, 65 L. ed. 238, 239; *Campbell* v. *United States*, 266 U. S. 368, 370-371, 69 L. ed. 328, 330; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489, 75 L. ed. 473, 476; *Jacobs* v. *United States*, 290 U. S. 13, 16, 78 L. ed. 142, 144.

This without more meets the constitutional requirement for just compensation. "• • • the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to

make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end." *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306, 56 L. ed. 771, 777.

Nor need the implied promise be coupled with the privilege of suing the United States, for "it is to be assumed that the United States is incapable of bad faith," *Great Falls Mfg. Co.* v. *Garland, Atty. Genl.*, 124 U. S. 581, 599, 31 L. ed. 527, 533,—that Congress "will be faithful to its duty under the Constitution," *Downes* v. *Bidwell*, 182 U. S. 244, 344, 45 L. ed. 1088, 1128.

Only if the implied promise should be repudiated would there be any ground to argue that there was no provision for just compensation and therefore a wrongful taking. "And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal." *Lynch* v. *United States*, 292 U. S. 571, 582, 78 L. ed. 1434, 1442.

So, in the case of the *Yankton Sioux Tribe of Indians* v. *United States*, 272 U. S. 351, 71 L. ed. 294, *ante*, 35, the taking was held to be a taking under the power of eminent domain although the act of Congress authorizing the taking made no provision for determining just compensation, and no right to sue the United States existed until the passage, subsequently, of the jurisdictional act, as in the present case.

4. The proposition that the Klamath Indians are entitled to recover, the value of the 87,000-acre tract taken from them in 1908, *with interest from that date to the date of payment*, as for a taking under the power of eminent domain, is not in conflict with the provision of § 3 of the juris-

dictional act that if it be determined that the Government "has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of the said appropriation."

Property is not *wrongfully* appropriated by the Government when the officer taking it acts under legislative authority, *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 234-235, 58 L. ed. 1290, 1293; and, as we have seen, the Secretary of the Interior in conveying to the California & Oregon Land Company the 87,000 acres within the boundaries of the Klamath Indian Reservation acted under the express authority of an act of Congress.

The case of *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, 64 L. ed. 935, illustrates the difference between a wrongful appropriation of property and a taking under the power of eminent domain. The Commanding General of the Department of Alaska, without authority, took possession of a placer mining claim on the public lands as part of a site for an army post. Subsequently the Secretary of War, who alone had authority, under acts of Congress, to take land for such purposes, ratified the action of the Commanding General. This, it was held, converted what had been a wrongful appropriation into a taking under the power of eminent domain, the Court saying, "What he," the Commanding General, "had done before that date having been without authority, and hence *tortious*, created no liability on the part of the government." 253 U. S. 334, 64 L. ed. 937. [Italics ours.]

At the time the jurisdictional act was passed the Klamath Indians were asserting other claims besides this one. The claim most urged was that they had been deprived of many thousands of acres of land by an erroneous survey made by officers and agents of the United States of the boundaries

of their reservation as defined in the Treaty of October 14, 1864, *ante*, 11, —a claim asserted in another suit now pending in the Court of Claims, No. E-344. This *is* a case of wrongful appropriation, and as such comes within the operation of the measure of damages prescribed in § 3 of the jurisdictional act.

On the other hand, there is nothing in the jurisdictional act to indicate that Congress had any intention of diminishing the just compensation to which the Indians would be entitled under the Fifth Amendment for a taking of their property under the power of eminent domain.

Besides, Congress had no power to do any such thing, for "the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate." *Jacobs* v. *United States*, 290 U. S. 13, 17, 78 L. ed. 142, 144.

Therefore, in order for § 3 to limit the amount recoverable to the value of the 87,000 acres at the time of the taking, to the exclusion of interest, it would have to be construed, *first*, as applicable not only to a "wrongful appropriation," in accordance with its terms, but to a taking under authority of an act of Congress in the exercise of the power of eminent domain, and *second*, as making the grant to the Klamath Indians of the privilege of suing the United States conditional upon the surrender of their constitutional right to interest as an element of just compensation.

As just shown, there is no warrant for such a construction. But even if the matter were doubtful such a construction must be rejected in conformity with the rule that—

> "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps* v. *United States*, 274 U. S. 341, 344, 71 L. ed. 1083, 1085; *Russian Volunteer Fleet* v.

United States, 282 U. S. 481, 491, 75 L. ed. 473, 477; and *Jacobs* v. *United States*, 290 U. S. 13, 17, 78 L. ed. 142, 144.

A similar question came before this Court in a group of cases involving § 177 of the Judicial Code, U. S. C. A., Title 28, § 284, which prohibits the allowance of interest on any claim against the United States "up to the time of the rendition of judgment by the Court of Claims."

The question was whether this provision prevents the allowance of interest, prior to judgment, in suits against the United States on claims for just compensation for the taking of property under the power of eminent domain; in other words, whether the effect of this provision was to make the consent to sue the United States on such claims conditioned upon a surrender by the claimants of their right to interest as an element of just compensation.

The lower courts held that it did. *Liggett & Myers Tobacco Co.* v. *United States*, 61 Ct. Cl. 693, 703, 705; *Booth & Co.* v. *United States*, 61 Ct. Cl. 805, 816; *Phelps* v. *United States*, 61 Ct. Cl. 1044; *United States* v. *Jacobs*, 63 F. 2d 326.

In the case last cited the Circuit Court of Appeals said:

> "• • • And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. Revised Statutes, § 1091; 28 U. S. C. A. § 284. This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims.' 28 U. S. C. A. § 41 (20). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest." 63 F. 2d, 327.

This Court reversed these decisions. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 71 L. ed. 1006; *Phelps* v. *United States*, 274 U. S. 341, 71 L. ed. 1082; *Jacobs* v. *United States*, 290 U. S. 13, 78 L. ed. 142. Citing and applying the rule above stated, that "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution," it held that interest as an element of just compensation is not "interest" within the meaning of § 177 of the Judicial Code. *Phelps* v. *United States*, 274 U. S. 344, 71 L. ed. 1085; *Jacobs* v. *United States*, 290 U. S. 17, 78 L. ed. 144.

Again in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 75 L. ed. 473, an alien friend, a corporation organized under the laws of Russia, brought suit in the Court of Claims to recover just compensation for the requisitioning, under authority of the Act of Congress of June 15, 1917, c. 29, 40 Stat. 183, of contracts for the construction of two ships. The property rights of alien friends are within the protection of the Fifth Amendment, 282 U. S. 489, 75 L. ed. 476. However, under § 155 of the Judicial Code, U. S. C. A., Title 28, § 261, only those aliens are authorized to sue the United States in the Court of Claims "who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts," 282 U. S. 488, 75 L. ed. 475, and it was *not* shown that citizens of the United States are entitled to prosecute claims against the government of Russia in the courts of that country, 282 U. S. 491, 75 L. ed. 477. So it was argued that the suit could not be maintained.

But as fulfillment of the requirements of § 155 of the Judicial Code was not specified as a condition of the right to sue under the Act of June 15, 1927, this Court refused to imply a condition that would have deprived the plaintiff of the

means of enforcing its constitutional right to just compensation for the taking of its property, 282 U. S. 491, 75 L. ed. 477, citing *Phelps* v. *United States*, 274 U. S. 341, 344, 71 L. ed. 1083, 1085, *ante*.

Similarly, even if § 3 of the jurisdictional act in this case were ambiguous and not in terms limited to *wrongful* appropriations of property, it would have to be construed so as not to exclude interest as an element of just compensation for the taking of property under the power of eminent domain.

5. It follows that the Klamath Indians are entitled to recover the value of their interest in the 87,000 acres at the date of the taking, July 26, 1906, Finding X, R. 24, to wit, $2,980,000, Finding XI, R. 24, plus interest at a proper rate from the date of the taking to the date of payment. In *Seaboard Air Line* v. *United States*, 261 U. S. 299, 306, 67 L. ed. 664, 670, this Court approved as the proper rate of interest in such a case the legal rate in the State in which the property taken was located. That would be six per cent in the present case. Oregon Laws (Olson), Vol. II, Title XLIII, c. VI, § 7988.

Point IV.

The Court of Claims in contravention of the jurisdictional act allowed as set-offs against the claim of the Klamath Tribes expenditures by the United States in fulfillment of its treaty obligations and expenditures not made for the benefit of the Tribes.

The jurisdictional act provides that in rendering judgment—

> "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof." § 2.

There is a similar provision in nearly all of the later acts of Congress authorizing Indian tribes to sue the United States, and the accepted construction is that it refers to expenditures by the United States for the benefit of the Indians

> "*over and above* the disbursements made for their benefit in satisfaction of treaty or other legal obligations." *Blackfeet, etc. Tribes of Indians* v. *United States*, — Ct. Cl. —, decided December 4, 1933. [Italics ours.]

Therefore, expenditures which were not for the benefit of the Klamath Indians, or which, even if for their benefit, were in fulfillment of treaty or other legal obligations of the United States, are not allowable as set-offs under the jurisdictional act.

And if an expenditure for a purpose stipulated in a treaty is alleged to be in excess of what was required to comply with the treaty the findings of fact must show the amount of the excess in order for the United States to claim it as a set-off. *United States* v. *Blackfeather*, 155 U. S. 180, 39 L. ed. 114.

In the case cited the United States had undertaken in a treaty with the Shawnees to support and keep a blacksmith for the use of the Indians "for the term of five years, or as long as the President may deem it advisable," and to furnish tools for the blacksmith shop and three hundred pounds of iron annually. 155 U. S. 187, 39 L. ed. 117. It was found that the Shawnees had been paid for blacksmiths from 1824 to 1854 the sum of $17,408.73. *Ibid.* The Court held:

> "As there is no finding how much of this sum was expended during the five years, or the extended period deemed 'advisable' by the President, during which the Government was bound to keep up the blacksmith's

shop, the finding is too indefinite to be made the subject of a set-off." 155 U. S. 187, 39 L. ed. 117.

The set-offs claimed by the United States in the present case were enumerated in its Request for Findings of Fact in the Court below, XIV, XV, XVI, XVII, XVIII, pp. 851-857, a certified copy of which has been filed with the Clerk of this Court.[1]

Petitioners in their motion for a new trial and amended findings requested the Court below to set forth in its findings the items of expenditure claimed as set-offs by the United States, but it set forth only the rejected items, lumping together the allowed items aggregating $1,978,431.24. Finding XXI, R. 28.

However, by comparing the rejected items with the items claimed by the United States in its Request for Findings of Fact, the allowed items are readily ascertainable. They include the following, the allowance of which was assigned as error in the petition for certiorari:

1. Agency buildings, two items, $1,545.51 and $8,832.83; incidental agency expenses, two items, $10,032.94 and $11,189.29; pay of subagents, $83.33; pay of Indian agents, two items, $16,956.04 and $17,846.72; pay of interpreters, two items, $14,593.41 and $2,997.66; pay of miscellaneous employees, two items, $40,848.75 and $333,871.16; pay of judges, Indian courts, $3,662.79; pay of matrons, $7,056.00; pay and equipment of Indian police, two items, $11,533.92 and $84,992.56; in all, $566,042.91. Government's Request for Findings of Fact, XIV, XV, pp. 751, 753.

2. Indian school and agency buildings, $70,281.22. *Ibid.*, XV, p. 754.

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[1] The request for findings of fact is included in a document entitled: "Defendant's Objections to Findings of Fact Requested by Plaintiffs, Request for Findings of Fact, Brief, and Appendix.

3. Erection and repair of sawmill, $6,671.25. *Ibid.*, XV, p. 754.

4. Transportation by carrier, two items, $56,309.60, *Ibid*, XIV, p. 752, and $110,537.95, *Ibid.*, XV, p. 754, in all, $166,847.55, less $89,277.95, conceded by the Government to have been erroneously included, Supp. Br., Court of Claims, p. 915.

5. Education of children of the Klamath Tribes at schools off the Reservation, $269,746.00, Government's Request for Findings of Fact, XVII, p. 756, less $45,723.09, conceded by the Government to have been erroneously included, Supp. Br., Court of Claims, p. 918.

1. All the items of this group are expenditures for essentially governmental purposes—administration, enforcement of the laws, and police.

This Court has repeatedly laid down the rule that in view of the very great disadvantages under which the Indian tribes labor in negotiating and drawing up treaties the provisions of such a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54, and other cases previously cited, *ante*, 30.

It is a challenge to reason to say that the Klamath Indians would naturally have understood their treaty with the United States to charge them, either certainly or contingently by way of set-off should they have any claims against the United States, with expenditures made by the United States for the essential purposes of Government in the area within their reservation.

On the contrary one would suppose that aside from the obligations resting upon the United States as sovereign there would arise out of the Treaty itself, that is, from the requirement that the Indians should "acknowledge their

dependence upon the Government of the United States, * * * and submit to and obey all laws and regulations which the United States may prescribe for their government and conduct," Article IX, 16 Stat. 709, a reciprocal obligation on the part of the United States to provide for such essential services of government as administration, enforcement of the laws, and police.

This construction is further borne out by the reference in the Treaty to "the Superintendent or Agent having charge of the tribes," and the provision "that no white person shall be permitted to locate or remain upon the reservation except the Indian Superintendent and Agent, employees of the Indian Department, and officers of the Army of the United States." Articles I, II, 16 Stat. 707-708.

That these provisions imposed upon the United States the obligation of maintaining an agency on the reservation for the purposes of administration is supported by the decision of the Comptroller of the Treasury of August 15, 1905, 12 Comp. Dec. 77, construing substantially similar provisions of the Treaty of 1868 with the Crow Indians, 15 Stat. 649, 650. The question there was whether disbursements for salaries of employees of the agency maintained on the Crow Reservation and for forage and fuel for the agency were in fulfillment of obligations of the United States under the Treaty of 1868. The Comptroller held that they were:

> "Articles III, IV and V of said Treaty of 1868 contemplated the maintenance by the United States of an Indian agency for the Crow Indians, and that the expenses incident thereto are to be paid by the United States. The agency expenses paid on vouchers 19, 34, 35 and 36 amounting to $2,067.97, were ordinary expenses pertaining to the agency, within the fourth condition of the agreement of 1880, as much so as the salary of the agent."

In addition the Treaty with the Klamath Tribes obligated the United States to expel all trespassers immediately and to secure to the Indians the exclusive right of fishing in the streams and lakes and of gathering edible roots, seeds and berries within the limits of the Reservation. *Ibid*, Article I.

How could this obligation be fulfilled without a police force? The need of a police force for this purpose was repeatedly stated in the reports of the Superintendent of the Klamath Reservation and the Commissioner of Indian Affairs. Rep. Supt., 1887, 50th Cong., 1st sess., House Exec. Docs., Serial 2542, p. 269; Rep. Supt., 1889, 51st Cong., 1st sess., House Exec. Docs., Serial 2725, p. 273; Rep. Comr., 1885, p. XXIII.

Apart, therefore, from the question whether in the broad sense the United States was not under a legal obligation to make these expenditures in discharge of its duties as sovereign, the Treaty itself, properly construed, obligated it to make them. It follows that they are not proper set-offs under the jurisdictional act.

2. Insofar as the expenditure of $70,281.22 was for the erection and repair of agency buildings, the United States was obligated to make it because, as we have just seen, *ante*, 49, Articles I and II of the Treaty contemplated that the United States would maintain a superintendent or agent on the Reservation for the purposes of administration. And since the findings do not show what part of the expenditure, if any, was for other purposes, no part of it can be claimed as a set-off, since, under the decision in the *Blackfeather Case* if an expenditure by the United States for a treaty purpose is alleged to be in excess of what was required to comply with the treaty the findings must show the amount of the excess in order for the United States to claim it as a set-off. *Ante*, 46.

Moreover, the United States was also obligated by Article IV of the Treaty to erect "the necessary buildings for one manual-labor school," and keep them in repair for the term of twenty years. *Post*, 63. True, as the Government will doubtless point out, there were two other items of expenditure for "erection and repair of manual-labor school," of $2,819.83 and $10,706.28, respectively. But the obligation of the United States did not end with the erection of one building or two buildings for the manual-labor school. The obligation was to erect "the *necessary* buildings" for the school, and there was no time limit after which the obligation lapsed except as to making repairs. The Government cannot claim any part of this expenditure as a set-off on the ground that it was made for repairs after the expiration of twenty years from the date of erection of the buildings because the findings do not show what part, if any, that was. *Blackfeather Case*, 155 U. S. 180, 39 L. ed. 114, *ante*, 46.

3. Article IV of the Treaty obligated the United States to erect a sawmill without any mention of time, and then to keep it in repair for a term of twenty years. *Post*, 63. While, as the Government will doubtless point out, there was an earlier expenditure of $548.11 said to have been for the erection and repair of a sawmill, this amount on its face was inadequate for the purpose unless this provision of the Treaty is to be construed so narrowly as to make it practically worthless. It follows that the expenditure of $6,671.25 for this purpose was in fulfillment of a treaty obligation and therefore not a proper set-off.

4. Transportation by carrier was required in the fulfillment of Articles IV and V of the Treaty in connection, among other things, with the erection and repair of buildings. The obligation to erect the specified buildings was not limited as to time. The hospital was not erected until 1901, Report, Commissioner of Indian Affairs 1901, 57th

Cong., 1st sess., Serial 4290, H. Doc., Vol. 23, p. 347, and the school buildings were to be erected as needed. Transportation was also required in bringing supplies to the Agency which the Government was under obligation to maintain.

The findings do not show that any part of this expenditure was for transportation not required in the fulfillment of these treaty obligations. It follows under the rule of the *Blackfeather Case, ante,* 46, that the whole of it must be regarded as having been made under the Treaty, and therefore no part of it is a proper set-off under the jurisdictional act.

5. As to the item of $269,746.00 for the education of children of the Klamath Tribes at schools off the Reservation, the question is whether the expenditure was "for the benefit of said Indians or any band thereof" within the meaning of the jurisdictional act.

Mark the language—"said Indians *or any band thereof.*" Petitioners contend that this means expenditures for the benefit of the Indians *as a tribe or band* and not as individuals, and that the expenditure in question was for the benefit of individual Indians.[1]

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[1] As a matter of fact the Indians of the Klamath Reservation were opposed to sending their children to schools off the Reservation. Reporting on that subject the Superintendent of the Klamath Reservation stated: "The experience of the people here, and no doubt, it has been similar on other reservations, has been such in sending their children off to training schools, that they cannot be blamed for being prejudiced against them. It is an indisputable fact that of all the Indian children that have been taken away from this reservation to training schools, two-thirds of them are now dead, most of them having died at the schools to which they were taken, but some coming home to die." Report, Commissioner of Indian Affairs, 1892, 52d Cong., 2d sess., House Exec. Docs., Serial 3088, p. 412.

This was the position of the Court of Claims until recently. In *Osage Tribe of Indians* v. *United States*, 66 Ct. Cl. 64, the Court held that "expenditures for education of individual Indians at schools" were not proper set-offs under a provision of the jurisdictional act authorizing "any legal or equitable set-offs or counter-claims, including gratuities, which the United States Government may have against the said Osage Tribe of Indians." The opinion states:

> "It may, however, be well to state that as to the counter-claims the special act directed consideration only to counterclaims against the Osage Tribe and not against individuals of the Tribe. In this view of the matter, counter-claims Nos. 8 and 9, being for expenditures for education of individual Indians at schoools, are not within the meaning of the special act, and could not be considered in any event as an offset against the Osage Indians as a tribe." 66 Ct. Cl. 82.

Again, in *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, where the jurisdictional act provided that "the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said Tribe or any band thereof," the Court, refusing to allow as a set-off "the cost of educating individual children of the bands at various non-agency Indian schools," said:

> "The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as *tribes and bands* unless a contrary purpose is expressed in the act." P. 341. [Italics ours.]

But in *Blackfeet, etc., Tribes of Indians* v. *United States*, — Ct. Cl. —, decided December 4, 1933, where the jurisdictional act authorized "any legal or equitable defenses, setoffs, or counterclaims, including gratuities, which the United

States may have against the said Nations or Tribes," the court held that the "expense incurred in sending children to nonagency schools" *was* a proper set-off.

The Court attempted to distinguish the *Fort Berthold Case* on the ground that the jurisdictional act in that case did not authorize gratuities to be set-off, as it did in the *Blackfeet Case*. This, however, does not meet the Court's reasoning in the earlier cases that only expenditures for the benefit of the Indians *as tribes or bands*, whether gratuities or what not, came within the set-off provision. Besides, the set-off provision in the *Osage Case*, as in the *Blackfeet Case*, expressly included gratuities. *Ante*, 53.

We maintain that the earlier decisions of the Court of Claims on this point were right and that consequently the expenditure of $269,746.00 for the education of children of the Klamath Tribes at schools off the Reservation was not a proper set-off under the jurisdictional act.

It is a harsh thing at best for the United States to cancel in whole or in part its just debt to an Indian tribe by taking back—or setting off as it is euphoniously called—absolute and unconditional gifts made to the tribe in all the years of the past as a condition of permitting the tribe to sue for the debt. Certainly such a policy should be carried no further than the statute clearly requires.

Conclusion.

The judgment of the Court of Claims should be reversed, with instructions to enter judgment for petitioners for the value of their estate in the 87,000 acres at the time of the taking, as heretofore found by the Court, together with interest at the rate of six per cent per annum from the date of the taking until the date of payment, less the $108,750 already paid, and less also the set-offs found by the Court to be chargeable against the petitioners under the jurisdic-

tional act corrected so as to exclude expenditures for administration, enforcement of the law and police, for Indian school and agency buildings, for the erection and repair of a sawmill, for transportation by carrier, and for education of Indian children at schools off the Reservation.

Respectfully submitted,

G. CARROLL TODD,
Counsel for Petitioners.

DANIEL B. HENDERSON,
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Of Counsel.

Appendix.

JURISDICTIONAL ACT, MAY 26, 1920, C. 203, 41 STAT. 623.

An Act authorizing certain tribes of Indians to submit claims to the Court of Claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Modoc Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit

to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no at-

torney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

ACT OF JUNE 21, 1906, C. 3504, 34 STAT. 325, 368.

* * * * * * *

That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior; and in order to facilitate such exchange and the development of the lands to be so taken thereunder there may also be

selected in like manner and as part of the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may prescribe thereunder. And when such exchange is effected patents for the lands so selected and approved shall issue therefor.

* * * * * * *

ACT OF APRIL 30, 1908, C. 153, 35 STAT. 70, 92.

* * * * * * *

That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath agency for the lands conveyed to the California and Oregon Land Company, in accordance with the provisions of the Act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: *Provided*, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved.

* * * * * * *

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS: CONCLUDED, OCTOBER 14, 1864; RATIFICATION ADVISED, WITH AMENDMENTS, JULY 2, 1866; AMENDMENTS ASSENTED TO, DECEMBER 10, 1869; PROCLAIMED, FEBRUARY 17, 1870. 16 STAT. 707.

ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA,

To all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Klamath lake, Oregon, on the fourteenth day of October, A. D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit: La-Lake, Chil-o-que-nas, Kellogue, Moghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poosak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toontuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mam, chiefs and headmen of the Klamths, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-iox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

Article I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided,* That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation,

except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

Article II. In consideration of and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

Article III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools,

seeds, clothing, and provisions, and for the payment of the necessary employes.

Article IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

Article V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

Article VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such

tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

Article VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

Article VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

Article IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

Article X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United may direct.

Article XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the

tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

Article XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

[Signatures.]

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

In Executive Session, Senate of the United States, July 2, 1866.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and Yahooskin band of Snake Indians, with the following

Amendments:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and.*

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved.*

Attest: J. W. FORNEY,
Secretary.

And whereas, the foregoing amendments having been fully explained and interpreted to the chiefs and headmen of the aforementioned Klamath and Moadoc tribes and Yahooskin band of Snake Indians, whose names are hereinafter signed, they did, on the tenth day of December, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendments, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did, on the second day of July, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and the Yahooskin band of Snake Indians, with the following amendments:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and*.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved*.

And whereas, the foregoing amendments have been fully interpreted and explained to the undersigned chiefs and headmen of the aforesaid Klamath and Moadoc tribes and Yahooskin band of Snake Indians, we do hereby agree and assent to the same.

Done at Klamath Agency, Oregon, on this tenth day of December, A. D. 1869.

In witness of which, the several parties named in the said treaty have hereunto set their hands and seals, at the place and date above written.

[Signatures.]

Now, therefore, be it known that I, Ulysses S. Grant, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the second of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty, with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington this seventeenth day of February, in the year of our Lord one thousand
[SEAL.] eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS.

G. CARROLL TODD,
Counsel for Petitioners.

DANIEL B. HENDERSON,
C. M. O'NEILL,
JOHN IRWIN,
T. HARDY TODD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS.

I.

As to the construction of the jurisdictional act.

1. The Government's contention that the jurisdictional act applies only to claims existing at the time of its passage is but another way of saying that the act does not authorize the reopening of any claim once settled—a contention already answered.

Briefly recapitulating,—

That the description, "all claims of whatsoever nature which the Klamath * * * Indians * * *. may have against the United tSates," § 1, was not intended to be limited to claims existing or outstanding at the time of the passage of the jurisdictional act, is made clear—

First, by the specific exception of claims "heretofore * * * determined by the Court of Claims," § 1.

This exception was wholly unnecessary if the description of the claims authorized to be submitted included only claims existing or outstanding at the time of the passage of the act.

Second, by the provision of the act that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," § 2.

Unless this applies to claims which had been discharged by payment in full, and therefore no longer outstanding, it means nothing, because, of course, in no event would a payment on account operate as an estoppel.

Third, by the legislative history of the jurisdictional act.

After all the explaining in the Government's brief, the facts remain that prior to the passage of the jurisdictional act the Indians and the United States entered into an agreement, which was ratified by Congress, under the terms of which the Indians were paid over half a million dollars,

> "*in full* of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in 1871." [Italics ours.]

Yet these very claims are among those mentioned in the reports of the House and Senate Committees on Indian Affairs as the occasion for recommending the passage of

the jurisdictional act, and this prior settlement was not only known to the Committees but copied in the Reports, showing that the act was intended to apply to claims which had been settled (other than claims settled by adjudication of the Court of Claims), as well as to unsettled claims.

The statement in the Government's brief that, "No money could properly be 'due' upon a claim which had been determined and which by a performed agreement of settlement had lost its character as a claim," p. 10, is but another form of the contention that the jurisdictional act applies only to claims existing at the time of its passage.

If we are right that by virtue of § 2 of the jurisdictional act acceptance of the $108,750 by the Indians in full payment cannot be set up against them as an estoppel, the difference between what was just compensation under the Constitution for the 87,000 acres and the $108,750 already paid is just as much money due the Indians as if the release had never been given.

It is said that the provision of § 2 waiving the defense of estoppel "relates solely to defenses that may be made to claims authorized to be submitted." P. 11.

We agree. But, as heretofore shown, by that very provision Congress authorized the submission of settled as well as unsettled claims, excepting only claims previously determined by the Court of Claims.

2. The assertion that, "It has long been established by the rulings of this Court that under special jurisdictional acts there can be no adjudication of any Indian claims depending upon the setting aside or abrogation of any article of a treaty," pp. 10-11, is, as already shown, based on a misinterpretation of the decisions. The *Choctaw Case*, 119 U. S. 1, 30 L. ed. 306, among others, was one in which the claim adjudicated depended for its validity upon the setting aside of a settlement between the Indians and the

United States. It all depends upon the language of the particular jurisdictional act. See Petitioners' Main Brief, pp. 15-16.

3. The remaining ground for the contention that the present claim is not within the jurisdictional act is that the reports of the Congressional Committees recommending its passage "described two claims which were to be submitted," and this was not one of the two, p. 13; that "no other claims of any character or description were submitted to or acted upon by Congress," p. 14; that "Congress definitely indicated the particular claims which were to be submitted to the Court of Claims, and the present claim was not included," p. 15.

But the act itself is not limited to any specific claim or claims or class of claims. It extends to "*all* claims of whatsoever nature which the Klamath • • • Indians • • • may have against the United States, which have not heretofore been determined by the Court of Claims." [Italics ours.]

Frequently a particular case leads to the enactment of a statute applicable to *all* cases of a given class. We had supposed it to be accepted that such a statute operates upon every case that comes within its terms—not merely upon the particular case that gave rise to its enactment.

"All," as this Court has said, "excludes the idea of limitation." *McLean* v. *United States*, 226 U. S. 374, 383, 57 L. ed. 260, 264; also *Southern Kansas Ry. Co.* v. *Briscoe*, 144 U. S. 133, 36 L. ed. 377.

Where Congress in granting an Indian tribe the right to sue the United States has intended to limit the right to a particular claim the statute has specified the claim. For example, see Act of April 4, 1910, c. 140, 34 Stat. 284.

Acceptance of the Government's contention would require the Court to substitute for a statute authorizing the

Court of Claims to hear and determine "all claims of whatsoever nature which the Klamath Indians • • • may have against the United States, which have not heretofore been determined by the Court of Claims," a statute authorizing the Court of Claims to hear and determine two certain claims of the Klamath Indians, (1) "for the recovery of money wrongfully taken from [them] to pay a judgment rendered against another tribe," and (2) "for lands said to have been lost by reason of an erroneous survey." P. 13.

This would be legislating, and with a free hand.

II.

As to whether the Klamath Tribes were bound by the alleged release.

The only answer that the Government makes to petitioners' contention that the alleged release was not the act of the Klamath Tribes and therefore was ineffectual to relinquish any rights of the tribes is that the Court of Claims by its findings has foreclosed that question. Pp. 16-17.

The question on this branch of the case is whether an alleged release of property rights of the Klamath Tribes, not authorized or approved by a majority of the adult members of the Tribes, or even a majority of the adult *male* members, in general council assembled, nor even voted upon at all in general council, is binding upon the Tribes.[1]

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[1] In its statement of facts on this branch of the case the Government's brief states that "the final result of the two council meetings was that 150 adult male Indians signed the release." P. 4.

It might be inferred from this statement that 150 adult male Indians signed the release at these two meetings. This is not the fact. An unknown number of the 150 signed at other times and places. See petitioners' Main Brief, pp. 21-22.

This is obviously a question of law and therefore any attempt by the Court of Claims to preclude a review of the question by incorporating its conclusions with respect to it in findings of fact would be inadmissible. *United States* v. *Pugh*, 99 U. S. 265, 25 L. ed. 322.

Nor has the Court of Claims made any such attempt.

While the Government's brief asserts that the Court of Claims "made specific findings that the * * * release [was] executed through the usual channels, that the release was properly executed, and that no duress was used," citing Findings of Fact XV, XVI and XVII, R. 25 and 26, we have been unable to find any such statements in the Findings of Fact cited or any others.

Furthermore, even assuming the question as to the binding effect of the alleged release upon the Klamath Tribes to be a question of mixed law and fact, as the Government suggests, and assuming further that the Court of Claims had made a finding on that question, the finding would not be conclusive unless it were impossible to separate the question so as to see whether any error of law had been committed. *Whitcomb* v. *White*, 214 U. S. 15, 17, 53 L. ed. 889, 891; *Ross* v. *Day*, 232 U. S. 110, 117, 58 L. ed. 528, 530.

III.

As to the value of the Indians' interest in the 87,000 acres.

In its brief in opposition to the petition for certiorari the Government challenged the finding of the Court of Claims as to the value of the Indians' interest in the 87,000 acres at the time of the taking on the ground that it "included the merchantable value of the timber thereon," and that "the Indians had no greater interest in the lands than that of *tenants for life*." P. 7. [Italics ours.]

In the present brief it challenges the finding on the ground that the Indians have no property right in the tim-

ber whatever because "by the express terms of the treaty (Article I) they were *tenants at will only.*" P. 17. [Italics ours.]

A finding of the Court of Claims as to the value of property taken under authority of an act of Congress is a finding of fact and therefore not reviewable. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 540, 71 L. ed. 394, 397.

Assuming, however, that the finding is reviewable, and assuming further that the Court of Claims included the whole value of the timber on the 87,000 acres, the finding must be sustained, as the *whole* beneficial interest in timber, etc. on the Indian reservations—not merely the interest of a life tenant or of a tenant at will—belongs to the respective tribes.

As standing timber is part of the land, *United States* v. *Cook*, 19 Wall. 591, 593, 22 L. ed. 210, 211, the rights of an Indian tribe in the timber on the lands of a reservation held by the tribe under the usual Indian title depends upon the nature of that title.

The nature of the Indian title has been discussed in many cases. In *Worcester* v. *State of Georgia*, 6 Pet. 515, 580, 8 L. ed. 483, 508, it was said:

> "• • • Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called *the right to the ultimate domain*, but the Indians have a present right of possession." [Italics ours.]

And again in *Mitchell* v. *United States*, 9 Pet. 711, 746, 9 L. ed. 283, 296:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual posses-

> sion as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. • • •
>
> "• • • it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites."

In *United States* v. *Cook*, 19 Wall. 591, 22 L. Ed. 210, the controversy was over the ownership of logs cut from the Oneida Indian Reservation in Wisconsin by a member of the tribe for the sole purpose of sale. Holding, as had always been held, that the Indians in possession of a reservation have only a right of occupancy in the land and that the fee is in the United States, it was decided that the members of the Oneida Tribe had no right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs.

In reaching its conclusion the Court considered the nature and attributes of the Indian right of occupancy, saying:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, • • •."
> 19 Wall. 593, 22 L. ed. 211.

And that—

> "This right of use and occupancy by the Indians is *unlimited*. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to

justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

"The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It *can* be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land." 19 Wall. 593, 22 L. ed. 211. [Italics ours.]

In the Court below the Government argued that the *Cook Case* decided that the interest of the Indians in the timber on their reservations "is that of a life tenant and no more." The Court did say, "What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more." 19 Wall. 594, 22 L. ed. 211.

But in thus comparing the position of the Indians with that of a tenant for life for the purpose of laying down a rule as to what things the Indians may and may not do on their reservations the Court could not possibly have meant that the Indians' *interest* in the lands of the reservations is only that of a tenant for life. For that would have been directly in conflict with its carefully formulated statement of the nature of the Indian title after reviewing prior cases—that the Indians have a right of use and occupancy of *unlimited duration* and an accompanying right of *unlimited duration* to cut timber for use upon the premises and also for the purpose of improving the land or the better adapting it to

convenient occupation and the right to sell all timber cut for that purpose.

In *Leavenworth, etc., R. R. Co.* v. *United States*, 23 Wall. 733, 23 L. ed. 634, the case was this: The Treaty of June 2, 1825, between the United States and the Osage Tribes of Indians, 7 Stat. 240, reserved for the occupancy of the Indians for an unlimited period a tract of land lying within the boundaries of what subsequently became a part of the State of Kansas. By an act approved March 3, 1863, 12 Stat. 772, Congress granted to the State every alternate section of land on each side of a projected line of railroad to aid in its construction. The state assigned the grant to the plaintiff in error. The line of the proposed railroad traversed part of the reservation of the Osage Indians. By the Treaty of January 21, 1867, 14 Stat. 687, the Indians ceded a part of their reservation, including the part through which this railroad passed, to the United States.

The question was whether the grant made by the Act of March 3, 1863, included the interest of the United States in the sections of land contiguous to the railroad in the Osage Reservation. It was held that this could not have been intended for the reason among others that the interest of the United States, being only a fee in reversion subject to a perpetual right of occupancy in the Indians, would have been of no immediate practical benefit for the purpose of the grant. 23 Wall. 743, 23 L. ed. 638.

Referring to the nature of the Indian title in general, the Court said:

> "As long ago as in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210, this

right of occupancy has been held to be sacred as the title of the United States to the fee." 23 Wall. 742, 23 L. ed. 638.

In *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440, the question was as to the ownership of logs cut from a tract of land claimed by the defendant under a grant from the State of Wisconsin made in 1870. The tract was within the limits of a grant of public lands from the United States to the State on the occasion of its admission into the Union in 1848.

The defendant's title was disputed on the ground that the tract was part of the land reserved for the occupancy of the Menomonee Tribe of Indians by the Treaties of 1825 and 1831 and therefore did not pass to the State by the grant of 1848.

It was held, citing *United States* v. *Cook, ante*, that while the Indians had a right of occupancy in the tract as a part of their reservation, the United States could and did by the grant of 1848 transfer the fee,[1] 95 U. S. 525, 526, 24 L. ed. 441, 442; that this was only a "*naked fee*," however, 95 U. S. 525, 24 L. ed. 441, "subject • • • to the existing occupancy of the Indians *so long as that occupancy should continue*," 95 U. S. 526, 24 L. ed. 442; that, nevertheless, the logs belonged to the defendant because before they were cut the Indians had removed from the land, causing the right of possession to attach itself to the fee, 95 U. S. 526-527, 24 L. ed. 442. [Italics ours.]

In other words the interest of the United States in the Indian land being only a *naked fee* did not embrace any vested rights in the timber but only a right contingent on the Indian occupancy coming to an end—a contingency

[1] There were no circumstances present, as in *Leavenworth, etc., R. R. Co.* v. *United States, ante*, indicating an intention *not* to transfer the fee.

which happened in that case but might not happen in another.

Referring to *Beecher* v. *Wetherby*, Attorney General Stone in an opinion to the President dealing with the question "whether the Indians' right of 'occupancy and use' included any right to the hidden and latent resources of the land," said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In *Worcester* v. *Georgia*, 6 Pet. 515, 544, 545, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, *as against each other*, which he defines as 'the exclusive right of purchasing such lands as the natives were willing to sell.' As late as 1872 the Supreme Court said: 'Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land *to* any other governments or their subjects.' (*Holden* v. *Joy*, 17 Wall. 211, 244.)" 34 Ops. A. G. 171, 181.

In *Spalding* v. *Chandler*, 160 U. S. 394, 402-403, 40 L. ed. 469, 472, Chief Justice White summarized the prior decisions on this subject as follows:

> "It has been settled by repeated adjudications of this Court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the *perpetual occupancy* of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the *same*

character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." [Italics ours.]

In *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 64 L. ed. 507, the question was whether the pasturing of cattle on the Crow Indian Reservation in Montana without the consent of the Indians violated R. S. U. S. § 2117, prohibiting the pasturing of cattle "on any land belonging to any Indian or Indian tribe, without the consent of such tribe."

This was a reservation "set apart for the absolute and undisturbed use and occupation of the Indians," Treaty of May 7, 1868, 15 Stat. 649, 650, so that the Crows had only the ordinary Indian title—the right of use and occupation.

The cattle in question were pastured on a part of the reservation which had been ceded to the United States, to be sold for the benefit of the Indians, and the contention was that this part at least was not "land belonging to any Indian tribe."

It was held, however, that even this part of the reservation, until sold by the United States, was "land belonging to [an] Indian tribe," as the United States held it only as a trustee.

Thus the respective rights of an Indian tribe and of the United States in a reservation occupied by the tribe under what is called the Indian title, whether aboriginal or based on treaty, are as follows:

First, the Indians have a right of occupancy in perpetuity, i. e., until voluntary abandonment (subject of course like all private rights to termination by the United States in the exercise of its powers as sovereign upon payment of just compensation), and, so long as they do not commit waste, may exercise this right at their discretion—in such mode as they see fit; that as regards standing timber in particular, while they may not cut it for the *sole* purpose of sale, as

that would be waste, they are entitled to cut it as long as their right of occupancy continues, i. e., for an unlimited time, for "use upon the premises," and "for the purpose of improving the land or the better adapting it to convenient occupation," and are entitled to sell all timber cut for the latter purpose.

Second, the United States has a "naked fee," "the right to the ultimate domain," which gives it the right to prevent waste and to recover the proceeds of anything severed from the land by acts constituting waste, but nothing more unless the Indians should abandon possession, in which event the right of possession would attach to the fee.

In other words the whole beneficial interest belongs to the Indians.

The acts of Congress and the acts and official statements of the Executive Department relating to the disposition of Indian lands reflect the same view of the nature and attributes of the Indian title.

Reviewing the acts of Congress on the subject Attorney General Stone in the beforementioned opinion to the President stated:

> "If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of 'occupancy and use' included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge.[1] As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. • • • Then, begin-

[1] Even this academic doubt would not exist with respect to timber because of course the Indians *did* have knowledge of that.

ning years ago, many special acts were passed (with or without previous agreements with the Indians concerned), whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. *In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value,* less only the expenses of the government in surveying and selling the land. • • •

"Similar provisions have been made in many other cases for the sale of surplus tribal lands, *all the proceeds of all elements of value to go to the tribe.* • • •" 34 Ops. A. G. 178-179. [Italics ours.]

Reflecting the view of the executive branch of the Government, the Reports of the Commissioner of Indian Affairs time and again treat the beneficial interest in timber on Indian reservations as the property of the Indians. For example:

"The timber interests of Indians on allotted and on tribal lands reach a present value of $84,000,000. • • • the timber on Indian reservations • • • is valued • • • in Oregon at $27,000,000. • • • In 1911 sales of timber brought in for Indians $2,192,000." Report, 1911, pp. 6-7.

Again:

"The property interests of the Indians constitute one of the greatest estates ever held in trust by any organization, governmental or private. Including the lands, forests, water power, minerals, and funds held in tribal or individual ownership, the Indians' principal amounts to approximately three-quarters of a billion dollars, and from this property in rentals and interest there comes annually approximately $12,000,000." Report, 1911, p. 50.

Again:

"The timber holdings of the Indians have stumpage value of more than $80,000,000. • • •

> "The Indians own tribal and individual timber valued at more than $80,000,000, * * *." Report, 1913, pp. 2-4.

The title of the Klamath Tribes is no different from that by which Indian tribes in general hold their reservations. Indeed the Treaty of 1864 in Article I expressly provides that the area set apart as a residence for the Klamath Tribes shall be "held and regarded as an Indian Reservation." Finding IV, R. 21.

And Article VI, in making provision for the subsequent allotment of the lands of the Reservation among the members of the Klamath Tribes, recognized their right to the whole beneficial interest in the lands. For, as stated in the before mentioned opinion of Attorney General Stone,

> "the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the General Allotment Act of 1887, which applies expressly to executive order reservations as well as to others." 34 Ops. A. G. 171, 178.

In *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94, 96, cited in *Mille Lac Band of Chippewas* v. *United States*, 46 Ct. Cl. 424, 464, referring to the title of the Klamath Tribes, it was held that—

> "For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands."

Also, in *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476, the Government described the title of the Klamath Tribes as follows:

> "The right of occupancy * * * is the real ownership. It is the full title, or as much title as, under

our conception, any other than the sovereign usually holds." First brief, October Term, 1901, pp. 25-26.

And again:

> "The Government never had any real ownership of these Klamath Reservation lands, but only a possibility of acquiring an ownership." Supplemental Brief, October Term, 1902, p. 16.

In the recent Act of March 4, 1933, c. 275, 47 Stat. 1568, relating to contracts for the sale of timber on Indian lands, Congress recognized that the beneficial interest in timber on the Klamath Reservation belongs to the Indians.[1]

The words, "until otherwise directed by the President of the United States," in Article I of the Treaty creating the Reservation, Finding IV, R. 21, and the provision in Article XI that the United States may locate other tribes upon this Reservation, Finding IV, R. 21, do not (as the Government contends here and as it contended unsuccessfully below) make the title of the Klamath Tribes any different from the title of Indian tribes generally.

The United States has always asserted the right to remove Indians from a reservation, and to locate other tribes on a reservation, upon making compensation, of course, or some equivalent provision for the Indians who are dispossessed. See *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55, 66-68, 30 L. ed. 330, 334-335; *Missouri K. & T. R. R. Co. v. Roberts*, 152 U. S. 114, 116-118, 38 L. ed. 377, 379; *Cherokee Nation v. So. Kans. R. Co.*, 135 U. S. 641, 654-657, 34 L. ed. 295, 301-302.

In *California & Oregon Land Co. v. Rankin*, 87 Fed. 532, it was expressly held that the words "until otherwise di-

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[1] The Act provides: "* * * That hereafter no contract of sale of *Indian timber* on the Klamath Indian Reservation in Oregon shall be entered into without the *consent* of the said general council." [Italics ours.]

rected by the President of the United States," in Article I of the Klamath Treaty, were not words of limitation so far as the Indian title was concerned. Thus:

> "The President can only direct the removal of these Indians in their interest. The right provided for as to this is not a limitation of the right of occupancy theretofore enjoyed by them, but a provision to make effective the authority to dispose of that right when the United States, acting in their behalf, determines that it is to their advantage that such interest should be sold." P. 533.

Or, it might be added, to make effective Article VI of the Treaty providing for the allotment of the Reservation in the discretion of the United States among the individual members of the Tribe.

Similarly, in *United States* v. *California & Oregon Land Co., ante,* 16, referring to this same language of the Klamath Treaty, the Government itself maintained that—

> "Of course, the phrase about the discretion of the President, taken in connection with the remainder of the treaty, can be seen to be a mere acknowledgment of the general dependence of the Indian tribes on the United States and submission to its future policy. It was not intended to reduce the title of the Indians in any way to the lands they had already owned and had not been paid for and make them holders of a mere tenancy at will of their beneficial ownership or right of occupancy." First brief, October Term, 1901, p. 25.

Any other construction of the Treaty would put the Indians in the position of ceding to the United States the vast area of land in the States of Oregon and California which they held under an undisputed title by immemorial possession, Finding II, R. 21, for a paltry pecuniary consideration (Article II of Treaty), and with no provision

for a place in which to live except a mere tenancy at will in a small fraction of the ceded territory.

Of course, it is impossible to believe that either party to the Treaty intended any such result, much less the Indians. To hold otherwise would make a mockery of the rule that treaties with the Indians must be construed "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54; *Marlin* v. *Lewallen*, 276 U. S. 58, 64, 72 L. ed. 467, 469; *Worcester* v. *State of Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315.

Furthermore, Article XI expressly provided that in consenting to the location of other tribes upon their Reservation the Klamath Tribes did not forfeit any of their rights under the Treaty.

IV.

As to the finding of the Court of Claims that the Indians made no claim for additional compensation for the 87,000 acres prior to the filing of the petition in this case.

The Government gives prominence to this finding as if it attached importance to it.

In their motion in the Court of Claims for amended findings of fact the plaintiffs asked that this finding be stricken out on the ground that there was no evidence at all to support it, and at the same time exhibited certified copies of records of the Department of the Interior showing three different complaints by the Indians, prior to the passage of the jurisdictional act, in respect of the settlement made with them for the 87,000-acre tract.

The Court of Claims adhered to its finding. The plaintiffs did not pursue the matter further because they were

advised that if their claim for additional compensation for the 87,000 acres is within the description of claims authorized by the jurisdictional act to be submitted to the Court of Claims, it is immaterial whether or not they have protested that the amount heretofore received by them was inadequate.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1934

No. 901

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN Band of Snake Indians, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18) is not yet reported.

JURISDICTION

The judgment of the court below was entered November 5, 1934 (R. 18). On November 24, 1934, petitioners moved for a new trial and to amend the special findings of fact. On November 28, 1934, respondent moved to amend the special findings of fact (R. 18). On April 8, 1935, an order was entered overruling petitioners' motion for a new

trial and allowing in part and overruling in part the motions to amend the findings of fact (R. 18). The petition for a writ of certiorari was filed April 24, 1935. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in holding that the jurisdictional Act did not waive the bar of a release given by petitioners and that the claim asserted was without the jurisdiction of the court.

2. Whether the Court of Claims erred in holding that the release was the act of the tribes of the Klamath Reservation and was effective as a surrender of petitioners' rights in or claims to the subject matter covered therein.

3. Whether the court erred in failing to conclude as a matter of law that the release was procured through duress.

STATUTES, TREATIES, AND AGREEMENTS INVOLVED

Treaty of October 14, 1864, 16 Stat. 707. See Finding IV (R. 21).

Act of June 21, 1906, c. 3504, 34 Stat. 325, 368. See Finding X (R. 24).

Act of April 30, 1908, c. 153, 35 Stat. 70, 92. See Finding XII (R. 24, 25).

Act of May 26, 1920, c. 203, 41 Stat. 623. See Finding I (R. 18).

STATEMENT

In 1864 the petitioners held by immemorial possession over 20,000,000 acres of land in what are

now the States of Oregon and California, their title being undisputed (Finding II, R. 21).

By the treaty of 1864 the petitioners ceded all their lands to the United States. Article I of that treaty is in part as follows (Finding IV, R. 21):

> *Provided,* That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians [and] held and regarded as an Indian reservation, * * * and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

Under the authority of the Act of June 21, 1906 (c. 3504, 34 Stats. 325, 368), the Secretary of the Interior on August 22, 1906, conveyed to the California & Oregon Land Company 87,000 acres out of petitioners' reservation without the knowledge or consent of petitioners (Finding X, R. 24). The occasion or purpose for this conveyance is not material here.

Thereafter, on November 2, 1907, the Secretary of the Interior sent to the Secretary of the Treasury a tentative draft of a bill appropriating $108,750 to be paid to petitioners as compensation for

the lands so taken. This bill was forwarded by the Secretary of the Treasury to the Speaker of the House of Representatives and by the Act of April 30, 1908, c. 153, 35 Stats. 70, 92, Congress appropriated the sum of $108,750 in payment to petitioners for 86,418.06 acres of land taken as aforesaid from their reservation. The Act is as follows (Finding XII, R. 24):

> That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath agency for the lands conveyed to the California and Oregon Land Company, in accordance with the provisions of the Act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: *Provided,* That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved.

Thereafter the Commissioner of Indian Affairs transmitted a form of release, in the language of

the appropriation Act, to the Superintendent at the Klamath Agency together with the instruction that "This release should be executed in your presence by a majority of the Indians on the reservation and should be certified to by you as the action of such majority" (Finding XIV, R. 25). In 1908 the total population of the Klamath Reservation was 1,038, of whom 640 were adults (287 men and 353 women). The adult males were alone allowed to vote in Indian councils (Finding XV, R. 25).

The Agency Superintendent called the Indians of the reservation to meet on December 5, 1908, for a council for the purpose of considering compliance with the appropriation Act of April 30, 1908, *supra* (Finding XV, R. 25). The council was attended by 200 or more Indians of the reservation. The Superintendent presided and explained the terms of the appropriation Act and what was necessary to be done, before the money would be available. A much larger sum had been recommended by the Superintendent. He was not in accord with the offer of settlement and did or said nothing to mislead the Indians. At this meeting one hundred or more Indians signed the release (Finding XVI, R. 26).

At Yainax, some forty or fifty miles from the general agency there is a subagency. The Indians of this subagency rarely ever attend councils at the general agency headquarters. A meeting was also called of the Indians of the subagency where simi-

lar proceedings were had. As a result of the two meetings 150 male adult Indians on the reservation signed a release (Finding XVII, R. 26), which is as follows (Finding XVIII, R. 26, 27):

> Whereas by an item in the Indian Appropriation Act approved April 30, 1908 (Public, No. 104), there is appropriated the sum of one hundred eight thousand seven hundred and fifty dollars ($108,750.00), or so much thereof as may be necessary to pay the Indians of the Klamath Agency for the land conveyed to the California and Oregon Land Company, in accordance with the provisions of the act of June 21, 1906 (34 Stat. L. 325–368), which sum is to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purpose as the Secretary of the Interior may prescribe; and
>
> Whereas it is provided in said act—
>
> That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved:
>
> *Now, therefore,* the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved.

The release signed as aforesaid was on January 6, 1909, received by the Secretary of the Interior from the Agency Superintendent. The Secretary accepted the release as a sufficient compliance with the appropriation Act of April 30, 1908 (*supra*), and the said sum of $108,750 was placed in the Treasury to the credit of petitioners. No claim has been made by petitioners for additional compensation save and except through the petition filed in this case (Finding XIX, R. 27).

The court below found that the value of this land to the petitioners in 1906, "under the title possessed by them", was $2,980,000 (Finding XI, R. 24). Respondent submits that such a statement is not a proper finding of fact, but is plainly the statement of a conclusion of law. The value placed by the court below on the petitioners' interest in the lands included the merchantable value of the timber thereon, rather than the value of the use of the timber in such a way as would not amount to waste. It was respondent's contention that under the ruling of this Court in *United States v. Cook*, 19 Wall. 591, the Indians had no greater interest in the lands than that of tenants for life.

The jurisdictional Act of May 26, 1920, c. 203, 41 Stats. 623, under which this action was brought, authorized the presentation of "all claims of whatsoever nature * * * for determination of the amount, if any, due said Indians from the United

States under any treaties, agreements, or laws of Congress" or "for the misappropriation of any of the funds of said Indians", or "for the failure of the United States to pay to said Indians any money or other property due."

Section 2 of said Act in part provides:

> That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, * * *.

The court below held that the jurisdictional Act did not confer upon the court authority to determine the claim and thereupon dismissed the petition as presenting a claim not within the jurisdiction of the court.

ARGUMENT

I

THE CLAIM SUED UPON IS NOT WITHIN THE JURISDICTIONAL ACT

The court below held the claim asserted not to be within the jurisdiction of the court by reason of a settlement agreement entered into by the parties prior to the Act. The position is taken on behalf of petitioners that the jurisdictional Act lifted the bar of estoppel created by the settlement agreement through the following provision:

by the settlement agreement through the following provision:

> * * * and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an off-set in such suits or actions * * *.

Whether it is correct to say that the failure of Section 2 of the jurisdictional Act to waive the effect of the release restricts the jurisdiction of the court or preserves a defense to the United States is immaterial.

With respect to the construction of Acts giving consent that the United States may be sued, this Court has uniformly held that such Acts should be strictly construed, that the subject of the litigation must be gathered from the plain letter of the law, and that jurisdiction will not be enlarged by implication or by giving to the words used in the Act a broader meaning than such words ordinarily have. *United States* v. *Old Settlers,* 148 U. S. 427, 468; *United States* v. *Choctaw, etc., Nations,* 179 U. S. 494, 534; *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373.

In order that petitioners' position be sustained, it must be held that the words of the Act "any payment * * * upon any claim" are broad enough to include a payment which has been made incident to a settlement agreement and that the language above quoted from the Act forbids the

pleading of the settlement as a defense. The court below correctly held that a "payment * * * upon a claim" is in law different from a settlement and release of a claim (R. 36). To give to these words the broad meaning contended for by petitioners it must necessarily be held that a settlement agreement is to be ignored if a payment was a consideration therefor.

The provision of the Act under discussion, i. e. payment as estoppel, has been used in fifteen other jurisdictional Acts[1] passed since 1920 wherein the courts are authorized to adjudicate claims of the Fort Berthold Indians, the Sioux, the Cherokee, the Seminole, the Creek, the Wichita, the Choctaw and Chickasaw, the Stockbridge, the Delaware, the Kaw, the Chippewa, the Pottawatomie, the Crow, the Assiniboine, and the Shoshone. Many treaties and agreements were made by the United States with these tribes of Indians prior to the passage of the several Acts, whereby for payments made by the United States the Indians' title to lands were obtained and matters of controversy settled. If petitioners' contention is carried to its logical con-

[1] Acts of February 11, 1920, c. 68, 41 Stat. 404; June 3, 1920, c. 222, 41 Stat. 738; March 19, 1924, c. 70, 43 Stat. 27; May 20, 1924, 43 Stat. 133, c. 162; May 24, 1924, 43 Stat. 139, c. 181; June 4, 1924, 43 Stat. 366, c. 249; June 7, 1924, 43 Stat. 537, c. 300; June 7, 1924, 43 Stat. 644, c. 335; February 7, 1925, 43 Stat. 812, c. 148; March 3, 1925, 43 Stat. 1133, c. 459; May 14, 1926, 44 Stat. 555, c. 300; July 2, 1926, 44 Stat. 801, c. 724; July 3, 1926, 44 Stat. 807, c. 734; March 2, 1927, 44 Stat. 1263, c. 250; March 3, 1927, 44 Stat. 1349, c. 302.

clusion, it will mean that Congress has intended that the stipulations of the treaties and agreements with respect to money considerations shall be ignored. It is unbelievable that Congress had such an intention. The court below has well said "that when Congress intends to waive a defense it has left no room to doubt the intention" (R. 35). In the Act approved February 7, 1925, c. 148, 43 Stat. 812, consenting that the Delaware Tribe present claims for adjudication Congress did not consider the language now under discussion sufficient to waive a settlement and thereupon added this provision: "The said Courts shall consider all such claims de novo * * * without regard to any decision, finding, or settlement * * *."

In the case of *Creek Nation* v. *United States* (63 C. Cls. 270), plaintiffs contended that a provision similar to Section 2 of the instant Act permitted the court to ignore a release given in a treaty. The court below held adversely to the contention, and this Court denied certiorari (274 U. S. 751).

Petitioners further argue that the reports of the Committees on Indian Affairs of the House and Senate which recommended the passage of the instant Act show that it was the intent that the Act include claims which had been settled by agreement. Upon a review of these reports it is plain that there is not the slightest indication of an intention that the committees recommended the passage of an Act with such purpose. It appears from the report of the House Committee (H. Rept.

672, 66 Cong., 2d Sess. Vol. 2, Cong. Doc.), which was referred to in the report of the Senate Committee (Sen. Rept. No. 548, 66 Cong., 2d Sess., Cong. Doc.), that there was a controversy with respect to the meaning and scope of the settlement agreement of 1901 which the Indians desired to have adjudicated. The claim of the Indians before the Congress was that they had lost 1,082,880 acres of land by reason of an erroneous survey; that the settlement agreement of 1901 was intended to cover payment for only 621,824 acres; and that it had been represented to them at the time the agreement was signed that the Government would later on settle with them for the remainder of their lands. The House Committee recommended that the Indians be permitted to present this claim which would involve the construction of the agreement, and thereby determine whether the agreement of 1901 accomplished a cession or relinquishment of lands in excess of 621,824 acres.

II

A MAJORITY OF THE MALE ADULT MEMBERS OF THE PETITIONING TRIBES, BY SIGNING A RELEASE, COULD SURRENDER PROPERTY RIGHTS BELONGING TO THE TRIBES WITHOUT THE AUTHORIZATION OF A GENERAL COUNCIL OF THE MEMBERS OF THE TRIBES

It then remains to determine whether the release was validly executed.

The Act of April 30, 1908, c. 153, 35 Stat. 70, 92, appropriating the sum of $108,750 in payment for the lands taken, provided that the appropriation shall not be effective until "said Indians, through

the usual channels, shall executed a release of any claims and demands of every kind against the United States for the land involved" (Finding XII, R. 25).

The Commissioner of Indian Affairs acting for the Secretary of the Interior transmitted a form of release in the language of the statute to the Superintendent of the Klamath Agency with the instruction that "this release should be executed in your presence by a majority of the Indians on the reservation and should be certified to by you as the action of such majority" (Finding XIV, R. 25).

On January 6, 1909, the Secretary of the Interior received from the Agency Superintendent a release signed by 150 adult male Indians of the reservation (Finding XVIII, R. 26). Thereupon the Secretary of the Interior accepted said release as a sufficient compliance with the provisions of the Act of April 30, 1908 (Finding XIX, R. 27).

In the early days treaties became binding on an Indian tribe when signed on its behalf by the chieftain or headman. In later years, especially with the Five Civilized Tribes, the tribes were permitted to execute contracts in the manner prescribed by the laws of the tribal governments, but in no instance has it been decided that tribal laws or tribal customs shall overcome the political power of the Government to declare the method to be employed by the tribes in the execution of contracts with respect to tribal property or tribal rights. This rule was announced in the case of *Lone Wolf* v. *Hitchcock*, 187

U. S. 553, and there has been no departure therefrom.

The expression "through the usual channels" as used in the appropriation Act was intended to govern the *modus operandi* of both parties to the transaction. That is to say, it was intended that the Executive Department of the Government which has jurisdiction of Indian Affairs should act upon the part of the United States in presenting the offer and in procuring the release and that the will of the Indians should be expressed in the manner determined to be the usual manner. The acceptance of the release signed by 150 male adults by the Secretary of the Interior was a determination by the officer of the Government that the release had been executed as required by the statute. As held in the *Lone Wolf* case, *supra,* the power of Congress to deal with the Indians is plenary. It directed in this case only that the money should not be available "until said Indians, through the usual channels, shall execute a release." Assuming that the phrase "usual channels" means the manner usually employed by the Indians to execute their documents, it is to be assumed that the Secretary of Interior, the Commissioner of Indian Affairs, and the Agency Superintendent adopted the "usual channels." No evidence was presented by the plaintiffs below to show that the method adopted was not the proper one. Cf. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 318. No finding

of fact was asked for. We must conclude that the method of execution was in accord with custom.

When a statute delegates the carrying out of its provisions to one of the Executive Departments, the interpretation of the statute by such Department will be given great weight by the courts. *United States* v. *Moore,* 95 U. S. 760, 764; *Robertson* v. *Downing,* 127 U. S. 607, 614; *United States* v. *State Bank,* 6 Pet. 29, 40; *Jacobs* v. *Prichard,* 223 U. S. 200, 214.

Petitioners do not make claim that a vote of a general council in favor of accepting the offer of Congress would have complied with either alleged tribal custom, the requirements of the appropriation Act, or the instructions of the Secretary of the Interior.

The cases cited on behalf of petitioners do not support their contention. The Pueblo of Santa Rosa was a body corporate (*Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 112), consequently its laws and customs relating to the disposal of its property were upheld. The case cited by petitioners, *Pueblo of Santa Rosa* v. *Fall* (Brief, p. 16), would have been entirely different and fallen under the ruling in *Lone Wolf* v. *Hitchcock, supra,* had the United States become the grantee, and in the manner as prescribed by a law of Congress.

So with the Choctaws, the United States recognized their laws and customs with respect to the disposition of tribal property only insofar as their

laws and customs did not conflict with the laws of the United States.

The record fails to show that the release was obtained or executed by any other method than "through the usual channels." The will of the majority of the tribe could not have been expressed in a more positive manner.

III

THE RELEASE WAS NOT SHOWN TO HAVE BEEN OBTAINED UNDER DURESS

Petitioners cite as error the failure of the court below to hold that the release was signed under duress. The court below did not find any fact upon which duress may be predicated.

In its opinion the court below stated that some fifty Indian witnesses testified that the Superintendent of the Agency stated to the Indians in substance "that if they did not accept the $108,750.00 and execute the release in question, they would lose both land and money—they would get nothing" (R. 39). But the court did not find that such a statement, or any other statement of similar import, was made, and holds, as to this and other elements of duress, that the record fails to establish the charge (R. 41). It was found, however, that "the Superintendent was not in accord with the amount appropriated to compensate the Indians, and he neither did nor said anything to mislead the assembly" (Finding XVI, R. 26).

The record fails to show duress.

CONCLUSION

This case was fully, fairly, and carefully considered by the Court of Claims. It is respectfully submitted that the petition for writ of certiorari fails to establish error of law on the part of the court below and that it should be denied.

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order was entered overruling the motion for a new trial and allowing in part and overruling in part the motions to amend the findings (R. 18), and on the same day judgment was entered dismissing the petition (R. 41). A petition for writ of certiorari was filed in this Court on April 24, 1935, and was granted on June 3, 1935 (R. 42). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the jurisdictional Act of May 26, 1920, confers jurisdiction on the Court of Claims to adjudicate this claim of petitioners notwithstanding the acceptance of payment and the execution of a release.

2. Whether facts presented to the Court of Claims, which made findings of fact, may be reviewed by the Supreme Court.

STATUTES AND TREATIES INVOLVED

The pertinent statutes and treaties are found in the Appendix, *infra*, pp. 19 *et seq.*

STATEMENT

The facts as found by the Court of Claims (R. 18–28) are in substance as follows:

In 1864 petitioners held by immemorial possession over 20,000,000 acres of land in what are now the States of Oregon and California (R. 21).

By the treaty of 1864 petitioners ceded all their lands to the United States. Article I of that treaty is in part as follows (R. 21):

> *Provided,* That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, * * * and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

In the same year that the treaty was negotiated, Congress authorized (Act July 2, 1864, c. 213, 13 Stat. 355; R. 21) the conveyance to the State of Oregon of certain lands in aid of a military road. Pursuant to an assignment by the State the lands were patented to a land company which was to construct the road. It was later discovered that approximately 111,400 acres of the road-grant lands were within the Indian Reservation area established by the treaty, and that a substantial portion of it was allotted to individual Indians. Congress then authorized (34 Stat. 325, 368; R. 24) the Secretary of the Interior to exchange 87,000 acres of other lands within the Reservation for the 111,400 acres, which was done. Thereafter, by the Act of

April 30, 1908 (35 Stat. 70, 92), Congress appropriated the sum of $108,750 as compensation to the Indians for their interest in the 87,000 acres. This Act contained the provision "This appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved" (R. 25).

In December, 1908, the Superintendent of the Indian Reservation, upon due notice, assembled a council of the Indians at the General Agency to consider compliance with the terms of the Appropriation Act (R. 25). Full information was given to the Indians of the effect of the release required to be executed by them (R. 26). The Indian population of the reservation at that time was 1,038, of whom 640 were adults, 287 men and 353 women. Only adult males were allowed to vote in Indian councils (R. 25). The Council Meeting at the General Agency was attended by 200 or more Indians and 100 or more signed the release at the meeting there (R. 26). A further council was held at a sub-agency forty or fifty miles distant. Sub-agency councils were customary to accommodate Indians who could not conveniently attend the General Council (R. 26). The same information was there given and the final result of the two Council Meetings was that 150 adult male Indians (R. 26) signed the release, which relinquished all claims and demands of every kind and character against

the United States for the lands involved (R. 27).

The petition in this proceeding was filed on May 23, 1925 (R. 1). Petitioners pray judgment for the sum of $5,891,250, and such other and further sums as might be found due them for the value of the 87,000 acres of land in question (R. 10–17). The jurisdiction of the Court of Claims was invoked and demand made under the Jurisdictional Act of May 26, 1920, 41 Stat. 623 (R. 1).

No claim for compensation for the 87,000 acres of land in addition to the $108,750 had been made by petitioners, either to the Congress, the Secretary of the Interior or the Commissioner of Indian Affairs, until the filing of this suit (R. 27).

Petitioners did make claims against the United States on account of erroneous surveys and because their moneys had been wrongfully used to pay a judgment against other Indians, and presented a memorial to Congress setting forth their claims in detail (Appendix, p. 29). The House Committee on Indian Affairs considered the memorial and made a report to the House recommending passage of the Act here in question.[1]

Petitioners contend that under the provisions of Section 2 of the Jurisdictional Act Congress re-

[1]Although not shown by the present record, petitioners have brought, and there are now pending in the Court of Claims under this Jurisdictional Act, two other suits: one involving the alleged erroneous survey and the other for an accounting.

moved the bar of the formal release executed by petitioners and permitted a reopening of any and all claims *de novo*, that the release was not authorized by a General Council of the tribe, and that signatures to the release were obtained by duress.

The Court of Claims made special findings of fact that the release was properly executed, that there was no duress, and found certain set-offs and the value of the land (R. 24–27). As a conclusion of law the court then held that petitioners were not entitled to recover and dismissed the petition (R. 28, 41).

SUMMARY OF ARGUMENT

1. The contention of petitioners is predicated upon the theory that the claim involved could be presented under the terms of the Jurisdictional Act of May 26, 1920, 41 Stat. 623, and could be adjudicated by the Court of Claims. This contention cannot be sustained because the claims which under the Jurisdictional Act were authorized to be submitted to and considered by the Court of Claims were *existing* claims. The claim of petitioners in the instant case had been satisfied in full by appropriation and payment and the execution by petitioners of a complete release. The Act does not purport to grant jurisdiction to review the merits of the claim released or to authorize a trial *de novo*. Special jurisdictional Acts may not be enlarged or

power granted by implication because of any supposed moral or equitable considerations.

The claims which were submitted to Congress with the request for the granting of jurisdiction to have them adjudicated were set out and described in petitioners' memorial to the Congress and in the Senate and House Committee Reports upon which Congress acted (Appendix, pp. 26–31). The claim in the instant case was not mentioned or referred to, but the request was confined to two entirely dissimilar claims of an unsettled nature.

The contention that Section 2 of the Act removed the bar of the release and permitted a consideration of all claims, including the claim submitted, is untenable in that the reference to payment could only apply to a claim that was within the jurisdictional grant. Here there was no payment upon an existing claim. The only payment was one made and accepted in full satisfaction of a claim heretofore made.

2. The contention of petitioners that the release was invalid in that a proper submission was not made "through the usual channels", that it did not receive a sufficient vote of the tribe and that it was secured by fraud and duress involves a question of fact or of mixed law and fact upon which the findings of fact by the Court of Claims is conclusive.

ARGUMENT

I

THE JURISDICTIONAL ACT DOES NOT CONFER JURISDICTION ON THE COURT OF CLAIMS TO ADJUDICATE THIS CLAIM OF PETITIONERS, IN VIEW OF THE ACCEPTANCE OF PAYMENT AND THE EXECUTION OF RELEASE

The Court of Claims determined that the claim of petitioners was not within its jurisdiction because not a claim of the class included within the terms of the Jurisdictional Act of May 26, 1920, c. 203, 41 Stat. 623, the material portions of which are:

> That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to

the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof.

It is contended by petitioners that by Section 2 of the Act the United States removed the bar of the release and permitted a reopening of all claims, including the claims submitted, for determination on the merits. Manifestly the language of the statute is controlling. The Act grants authority to the Court of Claims to adjudicate only claims: (a) for money due under treaties, agreements or laws of Congress; (b) for the misappropriation of any of the funds of said Indians; (c) for failure to pay the Indians any money or other property due. There is no reference in the Act to any closed and settled claims but only to such claims as petitioners had at the time of the passage of the Act. Jurisdiction

extends only to claims of the particular type authorized to be presented. Clearly the only claims authorized to be presented were those which were existing and of a specified character.

The rights of petitioners are purely statutory and the jurisdiction of the Court of Claims cannot be enlarged by implication. *Price* v. *United States and Osage Indians,* 174 U. S. 373, 375. Jurisdictional Acts of this character are strictly construed and the courts are not permitted to go beyond the letter of the consent to sue thus granted by the United States. *Schillinger* v. *United States,* 155 U. S. 163, 166. Equally settled is the principle that jurisdiction may not be rested upon merely moral or ethical obligations which are not expressed in pertinent treaties or statutes, nor may it be based upon any statutory interpretation that distorts the plain meaning because of a supposed injustice to the Indians. *United States* v. *Mille Lac Band of Chippewa Indians,* 229 U. S. 498. No money could properly be "due" upon a claim which had been determined and which by a performed agreement of settlement had lost its character as a claim. Specific authority would clearly need to be given in the Jurisdictional Act in order to set aside or disregard such agreement. This authority Congress has not granted.

It has long been established by the rulings of this Court that under special jurisdictional Acts there can be no adjudication of any Indian claims de-

pending for their validity upon the setting aside or abrogation of any article of a treaty. *United States* v. *Weld*, 127 U. S. 51; *Old Settlers Case*, 148 U. S. 427; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. In the instant case petitioners' contention of necessity involves the setting aside of the settlement and the voiding of the release, executed under Congressional authority, and consideration of the entire claim *de novo*. The principle to be applied to consideration of the settlement and release is similar with that applied by the courts where there has been asserted a right to disregard or override a treaty. Legislative history establishes that when Congress intended to authorize a trial *de novo* and to allow the court to disregard treaties, contracts or settlements, specific language was used granting such jurisdiction. *Choctaw Nation* v. *United States*, 119 U. S. 1, 29. The Court of Claims has held to the same effect. *Delaware Cases*, 72 C. Cls. 483; 74 C. Cls. 368. Under the plain language of the Act, only an existing claim can be considered.

It is contended, however, that the effect of the release and payment was abrogated by the language in Section 2 of the Act that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset." This provision relates solely to defenses that may be made to claims authorized to be submitted. It does not enlarge the type of claims permitted to be presented. As

pointed out by the court below, there is a marked distinction between "payment upon a claim" and a payment made, accepted and acknowledged in writing to be in full settlement, satisfaction and release of a claim.

The provision waiving payment as estoppel has been used in fifteen other jurisdictional Acts[1] passed since 1920 wherein the courts are authorized to adjudicate claims of the Fort Berthold Indians, the Sioux, the Cherokees, the Seminoles, the Creeks, the Wichitas, the Choctaws and Chickasaws, the Stockbridges, the Delawares, the Kaws, the Chippewas, the Pottawatomies, the Crows, the Assiniboines, and the Shoshones. Many treaties and agreements had been made by the United States with these tribes of Indians prior to the passage of the several Acts, whereby in return for payments made by the United States the Indians' titles to lands were obtained and matters of controversy settled. If petitioners' contention is carried to its logical conclusion it will mean that Congress has intended in these Acts that the stipulations of the treaties and agreements with respect to money considerations shall be nullified, and that

[1]Acts of February 11, 1920, 41 Stat. 404; June 3, 1920, 41 Stat. 738; March 19, 1924, 43 Stat. 27; May 20, 1924, 43 Stat. 133; May 24, 1924, 43 Stat. 139; June 4, 1924, 43 Stat. 366; June 7, 1924, 43 Stat. 537; June 7, 1924, 43 Stat. 644; February 7, 1925, 43 Stat. 812; March 3, 1925, 43 Stat. 1133; May 14, 1926, 44 Stat. 555; July 2, 1926, 44 Stat. 801; July 3, 1926, 44 Stat. 807; March 2, 1927, 44 Stat. 1263; March 3, 1927, 44 Stat. 1349.

the results of almost a century and a half of negotiation shall be opened for reconsideration.

The decisions submitted by petitioners as sustaining their contentions concern statutes that are entirely dissimilar to the statute in the instant case.

The Jurisdictional Act was not intended by Congress to include this claim. If there be doubt, legislative history, as shown by Committee Reports, is properly considered in determining the scope and purpose of a particular Act. *Binns* v. *United States*, 194 U. S. 486; *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290, 318; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 464; *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72, 79. The House Report, which was considered and approved by the Senate, described two claims which were to be submitted, namely, (1) a claim for the recovery of money wrongfully taken from petitioners to pay a judgment rendered against another tribe (House Report 672, p. 2, Appendix, p. 26); and (2), claims arising under the treaty between petitioners and the United States of October 14, 1864 (House Report 672, p. 6, Appendix, p. 26). The House Report (p. 13) clearly indicates that the claim upon which suit was being authorized was for lands said to have been lost by reason of an erroneous survey. Such also was the clearly expressed contention of petitioners in their memorial to the Congress (House Report 672, p. 15, Appendix, p. 26).

No other claims of any character or description were submitted to or acted upon by Congress. Manifestly Congress, in passing the Jurisdictional Act, intended to grant jurisdiction to adjudicate the two claims mentioned, which were then existing, and had no intention to submit a claim such as the present settled and adjusted claim.

This legislative history, petitioners say, shows that the House Committee on Indian Affairs intended to commit to the Court of Claims for adjudication another claim of the tribe, which claim likewise had been released and of which release the Committee was not only aware but actually copied it into its report. Consequently, petitioners intimate, the intent to waive the bar of the release by Section 2 is manifest.

Respondent submits that the report does not sustain the argument. The report (Appendix, pp. 26–32) shows that what the Indians were claiming was compensation for lands *additional* to those covered by the release and that it was *that* claim which they wanted to have adjudicated. It says (p. 8):

> The Indians contend, in the affidavits hereinafter set forth, that Inspector McLaughlin told them when they signed this agreement, which is hereinafter set forth, that the Government would later on settle with them for the remainder of their lands not included in said agreement.

The tenor of the whole report shows that the question of *waiving* a *release* was not involved, but only the question of whether or not the release given comprehended *all* lands erroneously excluded by the survey or, because of Article IV of the release (House Rep. p. 20), merely the 621,824 acres found by the boundary commission to have been so excluded.

It is submitted that the contention of petitioners is without merit because the claim here involved was not an existing claim covered by the Jurisdictional Act and because Congress definitely indicated the particular claims which were to be submitted to the Court of Claims, and the present claim was not included.

Petitioners' extensive argument (Br. 34–45) that they are entitled to just compensation under the theory of an implied contract under the Fifth Amendment, and that the Court of Claims therefore has jurisdiction, begs the question under consideration. Even if this were a taking by the power of eminent domain, which the Government does not concede, petitioners' argument is without merit. Plainly, when one accepts payment in full for property taken by the Government, he has no further claim to just compensation unless Congress chooses to remove this bar to his recovery.

II

THIS COURT WILL NOT REVIEW THE EVIDENCE UPON WHICH FINDINGS OF FACT ARE MADE BY THE COURT OF CLAIMS

Petitioners contend that the release signed is not binding and effective because not passed upon by the tribe in council assembled under formal proceedings and a vote taken by a majority of all members, male and female, of the tribe, and that the release is also invalid because signed under duress.

An extended discussion of these two contentions is unnecessary. They involve questions of fact; or at least questions of mixed law and fact. The record does not disclose any requirement that the tribal council should proceed in any particular manner or that any vote should be taken. The Appropriation Act of April 30, 1908 (c. 153, 35 Stat. 92) provided that "this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved." The Court of Claims made specific findings that the acceptance of the appropriation was submitted and the release executed through the usual channels, that the release was properly executed, and that no duress was used. (Findings of Fact XV, XVI and XVII, R. 25 and 26). These are findings of fact, or at least findings of mixed law and fact. Questions of fact decided

by the Court of Claims will not be reviewed. *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 537–540; *Saalfield* v. *United States,* 246 U. S. 610. Notwithstanding references in petitioners' brief to matters outside the record and petitioners' unauthorized filing of documents with the Clerk of this Court, there is no evidence in this case to be considered by this Court. Where evidence is not before the Supreme Court the findings of the Court of Claims must be accepted. *Jacob Reed's Sons* v. *United States,* 273 U. S. 200, 202.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Certain findings of the Court of Claims relate to the value of the timber on the tract involved and also to the amount of set-off to which the United States would be entitled if the claim had been considered by the court. These findings are wholly immaterial in view of the fact that the court was without jurisdiction to consider the claim; but even if that issue were before the court the finding as to the value of the timber is erroneous in that the treaty of 1864 reserved to the Indians only the rights of occupancy, to take fish, and to gather edible roots, seeds and berries. No property right to the timber was reserved to the Indians and by the express terms of the treaty (Article I) they were tenants at will only. *Johnson* v. *McIntosh,* 8

Wheat. 542, 574; *United States* v. *Cook,* 19 Wall. 591, 593. Should this Court reverse the Court of Claims on the question of jurisdiction, we pray that the cause be remanded for correction of this error as to the Indians' title and the value of their holding.

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OCTOBER 1935.

APPENDIX

Treaty of October 14, 1864, 16 Stat. 707 (Articles I and II):

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to

the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States; *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

ARTICLE II. In consideration of and in payment for the country ceded by this treaty,

the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and educa[illegible].

Act of June 21, 1906, c. 3501, 34 Stat. 325, the pertinent portion of which is as follows (p. 368):

That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions

of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior; and in order to facilitate such exchange and the development of the lands to be so taken thereunder there may also be selected in like manner and as part of the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may prescribe thereunder. And when such exchange is effected patents for the lands so selected and approved shall issue therefor.

Act of April 30, 1908, c. 153, 35 Stat. 70, the pertinent portion of which is as follows (p. 92):

That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath agency for the lands conveyed to the California and Oregon Land Company, in accordance with the provisions of the Act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treas-

ury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: *Provided*, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved.

Jurisdictional Act of May 26, 1920, c. 203, 41 Stat. 623:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or

attorneys for said Indians or bands of Indians.

SEC. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

SEC. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in

whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided,* That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

Report of Committee on Indian Affairs, Claims of the Klamath Tribe of Indians, House Report 672 (66th Cong., 2d Sess.), the pertinent portions of which are as follows (pp. 2, 6–8, 13):

The claims which the Indians mentioned in H. R. 5163, desire to submit to the Court of Claims are as follows:

1. On February 15, 1909, the Court of Claims of the United States, in the case of Milton J. Thompson against the United States and the Klamath Tribe of Indians (Indian Depredations, No. 6650), rendered judgment against the Lower Klamath Indians or Klamath River Indians in the sum of $3,375.

Said judgment was satisfied out of the funds of the Klamath Tribe of Indians mentioned in H. R. 5163, although said Klamath Tribe was a distinct and separate tribe from the Lower Klamath Indians or Klamath River Indians against whom said judgment was rendered.

* * * * *

2. The other claims which the Indians desire to submit to the Court of Claims are claims arising under the treaty between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, concluded October 14, 1864, and proclaimed February 17, 1870 (16 Stat. L., 707).

Under the provisions of the above treaty, a copy of which is hereinafter set forth, said Indians ceded to the United States approximately 20,000 square miles lying in Oregon and California, and retained as an Indian reservation for themselves approximately 3,500 square miles in the State of Oregon.

Among other considerations for the above cession the United States agreed to pay to said Indians in installments the sum of $80,000 in pursuance to Article II of the treaty * * *

* * * * *

In addition to the sum of $80,000 to be paid under said Article II, the United States further agreed to pay said Indians the additional sum of $35,000 in pursuance to Article III of the treaty * * *

* * * * *

It is the contention of the Indians, as shown in their petition to the Secretary of the Interior hereinafter set forth, together with the affidavits of several of said Indians, that the moneys agreed to be paid and expended under Article II and Article III of said treaty have not been fully paid and expended. The contention of the Indians in this regard is set forth in said petition as follows:

"That after signing the treaty, all that the Indians received from Mr. Huntington was fishhooks, lines, paint, a single blanket, one yard of calico to each family. In the fall of the year we received one blanket each and a small amount of common dress goods and one shirt each, and in the year 1865 we received three pairs of blankets and the following year we received overcoats; after that we received one cow each, and in

every district there was one wagon and a set of harness to be used by different Indians; that later on we received a few wagons and more harnesses to be used by different Indians; that no money was distributed among us at all under the treaty."

It is further contended by the Indians mentioned in said treaty that by the erroneous description of the lands reserved by them in said treaty and also by the erroneous survey and designation of the boundaries of their reservation they have lost 461,056 acres of land for which they have never been paid.

The basis for this claim is stated in the petition of said Indians hereinafter set forth, praying that Congress enact legislation which will enable them to submit their claims to the Court of Claims for final adjudication. * * *

* * * * *

On June 17, 1901, the United States Indian inspector, James McLaughlin, concluded an agreement with the Indians whereby they accepted the sum of $537,007.20 in payment for 621,824 acres of their reservation lands lost by erroneous surveys. The Indians contend, in the affidavits hereinafter set forth, that Inspector McLaughlin told them when they signed this agreement, which is hereinafter set forth, that the Government would later on settle with them for the remainder of their lands not included in said agreement.

It appears to the Committee on Indian Affairs that the Indians mentioned in said treaty of October 14, 1864, honestly believe that they have a good and bona fide claim against the Government, and it is the opinion of the committee that they are entitled to have their day in court, and that they should

be permitted to take the above claims into the Court of Claims for final adjudication.

INDIANS' MEMORIAL (AGREEMENT)

What lands did this instrument of June 17, 1901, convey? Surely not more than 621,824 acres of land.

The agreement of June 17, 1901, says that the Indians convey to the United States all their right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October 14, 1864, and the reservation boundary lines established by the survey of 1888 (containing 621,824 acres of land).

The land or reservation claimed by the Indians on October 14, 1864, was all of the land ceded to the United States. (See blue lines of map marked "Exhibit B," which indicates the tract of land claimed by the Indians on October 14, 1864.)

The tract of land set aside by the United States under the treaty of October 14, 1864, to the Indians contained about 2,279,040 acres of land. (See red lines of map marked "Exhibit B," which indicates the tract of land set apart as an Indian reservation to the Indians by the United States under treaty dated October 14, 1864.)

It is also manifest that under the treaty of June 17, 1901, that the Indians settled all claims to that date for damages for the erroneous survey of the outboundaries of their reservation in 1871. (See green lines of map marked "Exhibit B," which indicates the lines of the survey of 1871.)

By referring to the survey of 1871 (see green lines of map marked "Exhibit B") it will be observed that the Indians had been

deprived of the use of considerable land for some time, and hence this agreement of June 17, 1901, which also settled all demands for damages to that date for the erroneous survey of 1871.

Under the boundaries of the treaty of October 14, 1864, the Indian reservation contained about 2,279,040 acres of land.

This amount of land was left the Indians after they ceded to the United States the balance of the land they claimed:

Under the boundaries of 1896 the Klamath Indian Reservation contains about 1,196,160 acres of land. (See inclosed blue map.)

On June 17, 1901, the Indians conveyed to the United States 621,824 acres of land "lying between the boundaries described in the treaty with said Indians of October 14, 1864, and the reservation boundary lines as established by the survey approved in 1888 by the General Land Office."

Under the agreement of June 17, 1901, heretofore mentioned, article 4 of said agreement provides as follows (p. 20): "It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."

The land conveyed by the Indians on June 17, 1901, to the United States, amounting to 621,824 acres. Surely, under this agreement of June 17, 1901, it was not the intention of the Government to deprive the Indians of "any benefits to which they are entitled under existing treaties." (Pp. 13 and 14.)

The Indians therefore respectfully contend:

1. That they have never been paid for and have never conveyed to the United States about 461,056 acres of land.

2. That the survey of the boundaries of the reservation of 1871 is erroneous and was admitted to be erroneous by the treaty of June 17, 1901.

3. That the survey of the boundaries of the reservation as established by the survey approved in 1886 by the General Land Office and determined by the Klamath Reservation Boundary Commission which was approved on June 10, 1896, was erroneous, and more so than the survey of 1871.

4. The Indians respectfully refer to the map herewith inclosed, marked "Exhibit A and Blue Map," and to the affidavits and copies of affidavits referred to herein regarding this matter. The originals of the copies of affidavits and letters are on file in the office of the honorable Secretary of the Interior.

5. That the Indians never received the money or property which was promised them under the treaty of October 14, 1864.

By reason of the following facts, and by reason of the fact that the Indians are now in a position to obtain the testimony of the early white settlers and Indians as to their understanding as to the reservation boundary lines under the treaty of October 14, 1864, and by reason of the fact that the Indians are now in a position to obtain the testimony of numerous Indians and early white settlers as to the location of the 621,824 acres of land conveyed by them to the Government on June 17, 1901, and of the agreement made

at that time, the said Indians therefore respectfully ask that Congress enact proper legislation which will enable them to employ attorneys to properly prepare and submit these claims to the Court of Claims for final adjudication. (p. 15)

RELEASE

"Whereas by an item in the Indian Appropriation Act approved April 30, 1908 (Public, No. 104), there is appropriated the sum of one hundred eight thousand seven hundred and fifty dollars (108,750.00), or so much thereof as may be necessary to pay the Indians of the Klamath Agency for the land conveyed to the California and Oregon Land Company, in accordance with the provisions of the act of June 21, 1906 (34 Stat. L. 325–368), which sum is to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purpose as the Secretary of the Interior may prescribe; and

"Whereas it is provided in said act—

"That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved:

"Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved."

(Finding of Fact XVIII, R. 26 and 27.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1935.

The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Petitioners, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[December 9, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought under an Act of May 26, 1920,[1] conferring jurisdiction of claims asserted by plaintiffs against the defendant. It provides: "That all claims of whatsoever nature" the plaintiffs may have against the United States "which have not heretofore been determined by the Court of Claims" may be submitted to that court for determination of the amount, if any, "due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon" (§ 1); that if any claim be submitted to said courts they shall settle the rights therein, both legal and equitable, "notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions . . ." § 2.

The claim in suit is for the value of plaintiffs' rights in respect of about 87,000 acres which, less an admitted payment, is alleged to be $5,891,250. The answer is a general traverse. At the trial much evidence was taken and the contentions of the parties were fully presented. The court made findings of fact, stated its conclusions of law and dismissed the case. — C. Cls. —.

The questions for decision are:

Whether, assuming that before its passage plaintiffs gave de-

[1] 41 Stat. 623.

fendant a valid release of the claim in suit, the Act empowers the court to adjudicate that claim.

Whether the facts found are sufficient to show that the release given is invalid.

The findings are sufficiently reflected by the following narration. In 1864 plaintiffs held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California. By an Act[2] of March 25 of that year the President was authorized to conclude with them a treaty for the purchase of the country they occupied. The treaty was made October 14 following.[3] A proviso sets apart a tract within the ceded country, to be held until otherwise directed by the President, as a residence for plaintiffs with specified privileges. Rights of way for public roads were reserved.[4] Shortly before the treaty was made Congress granted Oregon, to aid in the construction of a road from the city of Eugene to the eastern boundary of the State, the odd-numbered sections for three in width on each side of the proposed road.[5] Oregon accepted the grant and assigned it to a road company which undertook to construct the road. Congress recognized the assignment.[6] Patents were issued to the State and to the road company for in all 420,240.67 acres, title to which was later acquired by a land company. Exclusive of right of way, 111,385 acres so acquired by that company were within the boundaries of the reservation and had been allotted in severalty to members of the tribe.

The Act of March 2, 1889,[7] directed suit by the United States to forfeit the grants for non-compliance with the specified conditions saving, however, the rights of bona fide purchasers. The company's title was held valid. *United States* v. *California &c. Land Co.*, 148 U. S. 31. Then the United States brought another suit to recover the part of the lands within the reservation on the ground that by the terms of the grant they were expressly excepted. But, as that issue could have been raised in the first suit, it was held *res adjudicata*. *United States* v. *California & Ore. Land Co.*, 192 U. S. 355.

The Secretary of the Interior reported the result of the litigation and expressed the opinion that the Indians should have com-

[2] 13 Stat. 37.
[3] Ratified July 2, 1866; proclaimed February 17, 1870. 16 Stat. 707.
[4] 16 Stat. 708.
[5] Act of July 2, 1864, 13 Stat. 355.
[6] Act of June 18, 1874, 18 Stat. 80.
[7] 25 Stat. 850.

pensation. Congress by an Act of June 21, 1906,[8] authorized the Secretary to exchange unallotted lands in the reservation for the allotted lands earlier conveyed. The Secretary made an agreement with the land company pursuant to which on August 22, 1906, it conveyed the 111,385 acres back to the United States and in return the latter conveyed 87,000 acres of unallotted lands to the company. That transfer was made without the knowledge or consent of plaintiffs and without giving them any compensation for the lands so taken from their reservation.

As found below, the value of plaintiffs' title was then $2,980,000.[9] An Act of April 30, 1908,[10] appropriated $108,750 to be deposited in the Treasury to the credit of the Indians and to be expended for their benefit. A proviso declares: "That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved".

The Indian population on the reservation was then 1,038, including 640 adults of whom 287 were men. The adult males alone were allowed to vote in Indian councils. The superintendent called a council to assemble at the general agency on December 5, 1908, for the purpose of considering compliance with the Act. The Indians were by the superintendent given timely notice in the usual way. The council, assembled in pursuance of the notice, was attended by 200 or more Indians. The superintendent presided and through an interpreter explained the terms of the measure and what would have to be done to get the appropriated money. There was some opposition but the release was signed by 100 or more Indians present. The superintendent "neither did nor said anything to mislead the assembly". Forty or fifty miles from the general agency there was a sub-agency at Yainax. The Indians in that section rarely attended councils at the general agency headquarters. The superintendent called another council at that place. In general the proceedings were the same as before; at that meeting others signed. In the end the release was signed by 150 adult males of the tribes on the reservation.

January 6, 1909, the Secretary received the release from the superintendent. In form it complied with the requirements of the Act and concluded: "Now, therefore, the undersigned, being

[8] 34 Stat. 325, 368.

[9] The court allowed counterclaims set up by defendant amounting to $1,978,431.24.

[10] 35 Stat. 70, 92.

a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved". The Secretary accepted it as sufficient compliance with the Act and accordingly $108,750 was placed in the Treasury to the credit of the plaintiffs. Except by the petition in this suit, they have made no claim for additional compensation.

1. The jurisdictional Act is a special law passed for the benefit of plaintiffs upon consideration of their application for relief. Their memorial specified other claims but made no reference to the one before us. There is nothing in what they presented (see H. Rep. No. 672; 66th Cong., 2d Sess., p. 8), the reports of the committees or the Act itself to identify, or to indicate that they wanted to have determined, any claim for compensation for their right to the 87,000 acres conveyed by the United States to the land company. Their failure, between the settlement in 1909 and the suit in 1925, to seek further payment and their omission to mention this very large demand, when seeking congressional action in their favor, makes strongly against their contention that the jurisdictional Act was intended to cover this claim. Cf. *United States* v. *Creek Nation*, 295 U. S. 103, 108-109.

The meaning of the general language of § 1 that "all claims of whatsoever nature" which plaintiffs have against the United States "may be submitted" is limited by the clause "which have not heretofore been determined by the Court of Claims" and is further much narrowed by the definitions of the classes of claims meant to be included. And correspondingly restrained is the meaning of the phrase "all legal and equitable claims" in the clause conferring jurisdiction upon the court "to hear and determine". Thus the privilege of plaintiffs to submit and the power of the court to determine are made coextensive. The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms. *Schillinger* v. *United States*, 155 U. S. 163, 166. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375. *Blackfeather* v. *United States*, 190 U. S. 368, 376.

This claim is plainly not, within the meaning of § 1, for an amount due under treaty, agreement or law of Congress or for misappropriation of funds of the Indians. Plaintiffs maintain

that it is covered by the clause: "for the failure of the United States to pay said Indians any money or other property due". There is here involved no question as to the adequacy of that language to cover any of the claims referred to in plaintiffs' application to the Congress; we are considering whether it extends to this claim assuming that prior to the enactment it had been effectively released. If the release stands, no money or property is due plaintiffs, for the settlement and release wiped out the claim. If the Act is sufficient to give jurisdiction of this claim, then it permits plaintiffs to bring into the Court of Claims for determination *de novo* all claims, whether released or not, that they ever had against the United States excepting only those already there determined. It goes without saying that, if Congress intended to grant so sweeping and unique a privilege, it would have made that purpose unmistakably plain. As shown in the opinion below, Acts intended to waive settlements employ terms quite different from the provisions under consideration.[11]

Plaintiffs turn for support to the provision of § 2 which prevents "payment . . . upon any claim" from being pleaded as an estoppel but permits it to be asserted as an offset. And they insist that, if this clause does not relate to payments made and accepted as being in full, it means nothing. But that contention is based on a misunderstanding of the language used. Payment upon a claim means payment on account or in part as distinguished from one made and accepted as payment in full. The quoted provision made no grant of jurisdiction; it was inserted merely to elimi-

[11] For instances where Congress authorized submission to the Court of Claims of Indian claims theretofore settled or adjusted, see Act of February 7, 1925, 43 Stat. 812, as amended March 3, 1927, 44 Stat. 1358: "The said courts shall consider all such claims de novo . . . and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"; construed in Delaware Tribe *v.* United States, 72 C. Cls. 483; *id.* 525; 74 C. Cls. 368. Act of March 3, 1881, 21 Stat. 504: Under a treaty of 1855, 11 Stat. 611, a determination had been made by the Senate and account was stated by the Secretary of the Interior. The Act authorized the court "to review the entire question of differences de novo" and declared that "the court shall not be estopped by any action had or award made by the Senate". Construed in Choctaw Nation *v.* United States, 19 C. Cls. 243; 119 U. S. 1, 29. Cf. statutes authorizing submission of claims not theretofore finally settled and released: Acts of February 11, 1920, 41 Stat. 404; June 3, 1920, 41 Stat. 738; March 19, 1924, 43 Stat. 27; May 20, 1924, 43 Stat. 133; May 24, 1924, 43 Stat. 139; June 4, 1924, 43 Stat. 366; June 7, 1924, 43 Stat. 537; June 7, 1924, 43 Stat. 644; February 7, 1925, 43 Stat. 812; March 3, 1925, 43 Stat. 1133; May 14, 1926, 44 Stat. 555; July 2, 1926, 44 Stat. 801; July 3, 1926, 44 Stat. 807; March 2, 1927, 44 Stat. 1263; March 3, 1927, 44 Stat. 1349.

nate defenses. Neither it nor any other part of § 2 may be held to add claims to those covered by the language of § 1. As jurisdiction will not be extended beyond the terms of the Act by any implication or other resort to construction, no force can be given to plaintiffs' suggestion that intention to include claims already settled and released is shown by the clause in § 2 allowing defendant credit for money it expended for plaintiffs.

Plaintiffs say the committees recommended inclusion of a released claim and suggest that therefore the intention of Congress was to include the one in suit. Plaintiffs brought that claim forward; it arose under the Treaty of ~~March 25~~ October 14, 1864, and involved questions concerning boundaries of the reservation meant to be defined by the treaty and boundaries as attempted to be established by surveys, and whether the release referred to extends to the area in respect of which the claim is asserted. The circumstances attending the enactment might be thought to have favorable bearing as to that claim. But as shown above plaintiffs' failure to disclose that it had and wanted to submit the claim in suit supports defendant's contention that the court below was without jurisdiction.

2. Have plaintiffs shown the release invalid?

The question is not whether under the circumstances disclosed the United States may set up the release as a defense. It is whether the special Act brings the claim within the court's jurisdiction. As this claim, if released, is not covered, it follows that in the court below the burden was on plaintiffs to prove the absence of valid release and that here their burden is to show that, as a matter of law, the facts found compel the conclusion that the release given is not valid. It is to be remembered that the Act of April 30, 1908, was passed by Congress in the exertion of its untrammeled power in behalf of the United States to fix, as it deems appropriate and just under the circumstances, the amount of compensation to be paid the Indians for the rights of the plaintiffs lost by the taking of the 87,000 acres from their reservation. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, 308. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565-566. *Choate* v. *Trapp*, 224 U. S. 665, 670-671. Cf. *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 506, 509-510. *United States* v. *Creek Nation*, *supra*, 110. They gave and through the Secretary of the Interior the United States accepted the release as sufficient to comply with the Act. It served to make the appropriation effective and was treated as fulfillment of the

conditions upon which the money was paid into the Treasury to be disbursed from time to time for plaintiffs' benefit. In the absence of findings of fact requiring conclusion to the contrary, it is to be presumed that all things necessary to make the appropriation effective and the release valid were done regularly and in accordance with the expressed will of Congress. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15.

The phrase "through the usual channels" is used in stating the condition without which payment would not have been made. There the expression is one of indefinite import. It does not necessarily mean the manner in which plaintiffs or other or all of the Indian tribes were then accustomed to make treaties or to negotiate other agreements with the United States. For aught that appears in the Act or findings of the court "usual channels" may have been used to signify something less than the proceedings, if any there were, usually followed by plaintiffs or Indian tribes generally. If this ambiguous phrase be held to require adherence to custom, there is nothing in the findings to show what the custom was. They fail to show that anything required by the Act was omitted.

Plaintiffs contend that the release is invalid because obtained by duress. But duress will not be presumed; nor will it be inferred from incomplete, doubtful or ambiguous findings. There is nothing to suggest that, in the making of the settlement, anything was done to overreach plaintiffs. On the contrary, the circumstances disclosed by the findings tend quite strongly to indicate that the negotiations were fairly conducted.

Plaintiffs say that the plain inadequacy of the payment, when taken in connection with the unequal positions of the parties, is enough without more to invalidate the release. The findings show that the amount paid plaintiffs was less than four per cent. of the value of the land. It was grossly inadequate. Where, in litigation between private parties, a release of claim is by the party who gave it challenged as invalid, inadequacy of consideration coupled with lack of business capacity and inferiority of position in respect of the transaction or in relation to that of the other party are elements having significance. *Wheeler* v. *Smith,* 9 How. 55, 82. *Thorn Wire Co.* v. *Washburn & Moen Co.,* 159 U. S. 423, 443. But the rules that govern in such cases have no application in suits by these Indian tribes against the United States. The relation between them is different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries or

otherwise. See *Choctaw Nation* v. *United States,* 119 U. S. 1, 28. *Lone Wolf* v. *Hitchcock, ubi supra. Choate* v. *Trapp, ubi supra.* Regard being had to the nature of duties, resembling those arising out of the relation of guardian and ward,[12] owed by the United States to Indian tribes, and in view of the undoubted power of Congress to determine the amount and to fix the terms of payment of compensation for the rights lost to plaintiffs, it is clear that, in the absence of specific authorization, they may not avoid the release given in accordance with the Act upon the ground that the payment was too small. That would enable them to question the laws of Congress in fields where, because of the relationship referred to, they are supreme.

The obligation of the United States to make good plaintiffs' loss is a moral one calling for action by Congress in accordance with what it shall determine to be right. Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review.[13] Even if judicially cognizable, as would be a like contention in ordinary litigation between individuals, plaintiffs' insistence that inadequacy of consideration invalidates the release could not here be sustained. That is so because the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release. Mere inadequacy of consideration is not enough. *Eyre* v. *Potter,* 15 How. 42, 59. Pomeroy, Equity Jurisprudence, 14th ed., § 926. Williston on Contracts, § 115.

As the Act does not extend to this claim if released, and as the facts found fail to establish invalidity of the release admittedly given, the jurisdictional Act does not extend to the claim in suit and the Court of Claims rightly dismissed the case. If plaintiffs are to have additional compensation, it must be obtained through legislation dealing with the merits or authorizing effective judicial determination.

Affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[12] United States v. Kagama, 118 U. S. 375, 383-384. Choctaw Nation v. United States, 119 U. S. 1, 27, 28. Jones v. Meehan, 175 U. S. 1, 10-11. United States v. Payne, 264 U. S. 446, 448.

[13] Lone Wolf v. Hitchcock, 187 U. S. 553, 567-568.